APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT FILED JANUARY 21, 2003 AND AMENDED MARCH 6, 2003 AND ORDER OF THE COURT AMENDING OPINION AND DENYING PETITIONS FOR REHEARING AND REHEARING EN BANC DATED MARCH 6, 2003

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

No. 01-17197
D.C. No. CV-99-05303-VRW

SUK YOON KIM, on behalf of himself and all others similarly situated,

Plaintiff-Appellant,

v.

ISHIKAWAJIMA HARIMA HEAVY INDUSTRIES LTD.; IHI INC.; SUMITOMO HEAVY INDUSTRIES LTD.; SUMITOMO HEAVY INDUSTRIES (USA) INC.,

Defendants-Appellees.

No. 01-17203
D.C. No. CV-00-03242-VRW

SA SON SIN,

Plaintiff-Appellant,

Appendix A

v.

MITSUI & CO, LTD.; MITSUI & CO. (USA);
MITSUI ENGINEERING & SHIPBUILDING CO., LTD.;
PACECO CORPORATION,

Defendants-Appellees.

No. 01-17211
D.C. No. CV-99-05309-VRW

JAE SIK CHOE,

Plaintiff-Appellant,

v.

NIPPON STEEL CORPORATION;
MITSUBISHI HEAVY INDUSTRIES, LTD.,

Defendants-Appellees.

No. 01-17251
D.C. No. CV-00-03752-VRW

DO GEUN OH; EUNG CHANG LEE; YONG HAE LEE, individually and on behalf of a class of persons similarly situated,

Plaintiffs-Appellants,

v.

Appendix A

MITSUI & CO., LTD., a Japanese business association; MITSUI & CO. (USA), a business association; MITSUBISHI CORPORATION, a Japanese business association; MITSUBISHI CORPORATION, a business association; MITSUBISHI HEAVY INDUSTRIES, LTD., a Japanese business association; MITSUBISHI HEAVY INDUSTRIES AMERICA, INC., a business association; MITSUBISHI MATERIALS CORPORATION, a Japanese business association; MITSUBISHI MATERIALS USA CORPORATION, a business association; NIPPON STEEL CORP, a Japanese business association; NIPPON STEEL USA, a business association; SHOWA DENKO AMERICA, INC., a business association; SHOWA KOGYO, a Japanese business association,

Defendants-Appellees.

Argued and Submitted Oct. 7, 2002.
Filed Jan. 21, 2003.
Amended March 6, 2003.

AMENDED OPINION

Plaintiffs-Appellants in these consolidated cases allege that they were forced to work as slave laborers for German and Japanese corporations during the Second World War. They seek damages and other remedies for lost wages and for other atrocious injuries they suffered in the course of their forced labor. Defendants-Appellees are corporations (or successors or affiliates of those corporations) that allegedly committed these atrocities.

Appendix A

A California statute passed in 1999 creates a cause of action against such defendants for claims involving Second World War slave labor.[1] Cal. Code Civ. Proc. § 354.6. Under the statute, these claims are not time-barred if commenced on or before December 31, 2010. *Id.* Although Appellants assert a variety of statutory and common law claims for relief, all raise section 354.6 as the primary basis for bringing their suits so many years after the alleged wrongs were committed. Reluctantly, we hold that section 354.6 is invalid under the United States Constitution and that in its absence Appellants' remaining claims are time-barred.

Background

These cases concern the terrible abuses that German and Japanese corporate interests inflicted both on civilians and on soldiers captured by German and Japanese military forces during the Second World War. The corporations and their managers, with the cooperation and encouragement of their governments, subjected many individuals to vicious cruelties and forced them to work long hours without pay. The slave workers were often underfed, physically beaten, exposed to dangerous conditions, and denied medical care; many were murdered, and others died as a result of the maltreatment they suffered. Among these slave laborers were, tragically, many who became victims of the Holocaust, the most atrocious act ever perpetrated by a civilized (or uncivilized)

1. Although the statute distinguishes between "slave laborers," *see* Cal. Code Civ. Proc. § 354.6(a)(1), and "forced laborers," *see* § 354.6(a)(2), the distinction is generally immaterial to the analysis in this opinion. We generally use the term "slave laborer" to refer to both categories of workers.

people, an act unparalleled in history. Indeed, the Holocaust represents the worst historic manifestation of the perpetual human condition known as antisemitism, a phenomenon that is still thriving in all too many parts of the world today.[2]

I. The Cases

A. *Deutsch v. Turner*

The suit by Appellant Josef Tibor Deutsch ("Deutsch") is the only action before us concerning wrongs committed by German rather than Japanese corporations and the only action that was not consolidated with other cases by the district court. It is, in other words, the only Holocaust case at issue here, and it, unlike most of the Japanese cases, involves only a single plaintiff.

Currently a resident of California, Deutsch, a Jew, was born and raised in Hungary. Deutsch asserts that, in 1944, when he was a child, the Nazis took over his town and

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2. It is plainly Holocaust survivors who are the intended beneficiaries of section 354.6, which speaks of "concentration camp[s]" and "ghettos[s]," mentions no power by name other than the "Nazi regime," and never employs the term "Axis Powers," which is the usual collective term for the enemies of the Allied Powers. Ironically, among the hundreds of thousands of plaintiffs in the cases before us, there is only one Holocaust survivor. All the other plaintiffs suffered their injuries in Asia at the hands of Japanese companies. Whatever the intended purpose of the California statute, the text of section 354.6 appears to be broad enough to encompass all the plaintiffs' claims, and not just those of the one Holocaust survivor. We follow the district court and all the parties before us in assuming that such is the case.

transported him and his brother Georg to Auschwitz. There the brothers were tortured and forced to work as slaves for 14-hour days, seven days a week. Their work was for the benefit of private corporations, which entered into agreements with the Nazi government, whereby they paid the Nazis less than the prevailing wage for the work of the slaves. The corporations for which the Deutsch children labored included Appellee Hochtief AG ("Hochtief"), one of Germany's largest and oldest construction companies. A civilian employee of Hochtief overseeing the slave laborers in their work for Hochtief beat Deutsch's brother Georg. Georg ultimately died from his injuries. By a stroke of good fortune, Deutsch, unlike most of his co-religionists, survived.

On April 7, 2000, Deutsch filed a complaint in the Superior Court of California against Hochtief, its wholly owned subsidiary the Turner Corporation, a Delaware corporation, and the Kitchell Corporation, an Arizona corporation that Hochtief owns in part. Deutsch alleged intentional infliction of emotional distress, unlawful business practices under the California Business and Professions Code, quantum meruit, and wrongful death. The action was removed to federal court on the ground of diversity jurisdiction.

Deutsch's basis for bringing the action so long after the alleged acts is section 354.6 of the California Code of Civil Procedure, which confers jurisdiction on the Superior Court to hear claims by "[a]ny Second World War slave labor victim" or "Second World War forced labor victim," or their heirs, against "any entity or successor in interest thereof, for whom that labor was performed, either directly or through a subsidiary or affiliate." Cal. Code Civ. Proc. § 354.6(b).

Section 354.6 permits such actions to be brought on or before December 31, 2010, regardless of any otherwise applicable statute of limitations. § 354.6(c).

The district court dismissed the action as presenting a nonjusticiable political question. *Deutsch v. Turner*, 2000 WL 33957691 (C.D.Cal.2000).

B. *In re World War II Era Japanese Forced Labor Litigation*

The consolidated appeal before us also involves 28 other suits, all by victims and heirs of victims against Japanese business entities. Some were brought as class actions. Because there are so many complaints, and because the precise factual allegations do not bear on our decision, we do not here recount the details of the injuries that the various Appellants endured. Unlike Deutsch, these individuals—some civilians, some soldiers who were prisoners of war —were not selected because of their religious affiliation and were not victims of an overall plan to exterminate an ethnic or religious group. Rather, they became subject to the Japanese slave labor program either because they opposed the Japanese war efforts, in one capacity or another, or simply because they were in the wrong place at the wrong time. In any event, they were all subjected to serious mistreatment, including starvation, beatings, physical and mental torture, being transported in unventilated cargo holds of ships, and being forced to make long marches under a tropical sun without water. Some survived, while others were ultimately executed, or died from disease or physical abuse.

Appendix A

Twenty-seven of the suits against the Japanese corporate interests were originally brought in California Superior Court, while one was initiated in the United States District Court for the Central District of California. The claimants demanded damages and other relief, raising claims under California Code of Civil Procedure section 354.6, and alleging, variously, assault and battery, unjust enrichment, conspiracy, false imprisonment, intentional infliction of emotional distress, conversion, quantum meruit, unfair business practices under California Business and Professions Code sections 17200 *et seq.*, involuntary servitude under California Penal Code section 181 and Article I, § 6 of the California Constitution, and violations of international law under the Alien Tort Claims Act, 28 U.S.C. § 1350. As defendants they name both Japanese corporations that they allege committed the injuries and successors and affiliates of those corporations. The suits filed in state court were removed to federal court; all were then consolidated in the Northern District of California. The district court denied motions to remand and dismissed all claims.

Appellants in the majority of the Japanese cases were, at the time of the occurrences that form the basis for these lawsuits, nationals of the United States or of other Allied nations. Many were in military service and were taken as prisoners of war. The district judge dismissed these cases on the ground that they were barred by a provision of the Treaty of Peace ending the war between the Allied Powers and Japan.[3] *In re World War II Era Japanese Forced Labor Litig.*,

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3. The provision that had this effect is Article 14(b), which provides as follows:

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114 F.Supp.2d 939, 944-49 (N.D.Cal.2000) (*Forced Labor* (*Allied I*)); *In re World War II Era Japanese Forced Labor Litig.*, No. MDL-1347 (N.D.Cal. Feb. 8, 2001) (*Forced Labor* (*Allied II*)); *In re World War II Era Japanese Forced Labor Litig.*, 164 F.Supp.2d 1153, 1157 (N.D.Cal.2001) (*Forced Labor* (*Filipinos*)).

Appellants in the remaining cases were Korean and Chinese nationals. The district court held that their claims were not affected by the Treaty of Peace between the Allies and Japan, because these claimants were not Allied nationals or nationals of any signatory of that treaty. *In re World War II Era Japanese Forced Labor Litig.*, 164 F.Supp.2d 1160, 1165-68 (N.D.Cal.2001) (*Forced Labor* (*Koreans*)). The court dismissed these cases nonetheless, on the grounds that section 354.6 was an unconstitutional intrusion on the foreign

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(Cont'd)

> Except as otherwise provided in the present Treaty, the Allied Powers waive all reparations claims of the Allied Powers, other claims of the Allied Powers and their nationals arising out of any actions taken by Japan and its nationals in the course of the prosecution of the war, and claims of the Allied Powers for direct military costs of occupation.

Treaty of Peace with Japan, Sept. 8, 1951, art. 14(b), 3 U.S.T. 3169, T.I.A.S. No. 2490. The district court held that claims by Allied nationals against Japanese corpo-rations were barred under the clause waiving "other claims of the Allied Powers and their nationals arising out of any actions taken by Japan and its nationals in the course of the prosecution of the war." *Forced Labor* (*Allied I*), 114 F.Supp.2d at 944-49 (N.D.Cal.2000).

affairs powers of the United States, and that the remaining claims were time-barred. *Id.* at 1168-78.

II. Constitutionality of Section 354.6 Under Foreign Affairs Doctrine

A. Section 354.6 and Its Effect

All Appellants rely on section 354.6 of the California Code of Civil Procedure. Because it can best be understood when read as a whole, we quote it in full:

> § 354.6.
>
> (a) As used in this section:
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> (1) "Second World War slave labor victim" means any person taken from a concentration camp or ghetto or diverted from transportation to a concentration camp or from a ghetto to perform labor without pay for any period of time between 1929 and 1945, by the Nazi regime, its allies and sympathizers, or enterprises transacting business in any of the areas occupied by or under control of the Nazi regime or its allies and sympathizers.
>
> (2) "Second World War forced labor victim" means any person who was a member of the civilian population conquered by the Nazi regime, its allies or sympathizers, or prisoner-of-war of the Nazi regime, its allies

or sympathizers, forced to perform labor without pay for any period of time between 1929 and 1945, by the Nazi regime, its allies and sympathizers, or enterprises transacting business in any of the areas occupied by or under control of the Nazi regime or its allies and sympathizers.

(3) "Compensation" means the present value of wages and benefits that individuals should have been paid and damages for injuries sustained in connection with the labor performed. Present value shall be calculated on the basis of the market value of the services at the time they were performed, plus interest from the time the services were performed, compounded annually to date of full payment without diminution for wartime or postwar currency devaluation.

(b) Any Second World War slave labor victim, or heir of a Second World War slave labor victim, Second World War forced labor victim, or heir of a Second World War forced labor victim, may bring an action to recover compensation for labor performed as a Second World War slave labor victim or Second World War forced labor victim from any entity or successor in interest thereof, for whom that labor was performed, either directly or through a subsidiary or affiliate. That action may be brought in a superior court of this state, which court shall have jurisdiction over that action until its completion or resolution.

> (c) Any action brought under this section shall not be dismissed for failure to comply with the applicable statute of limitation, if the action is commenced on or before December 31, 2010.

Appellants and the State of California as amicus seek to characterize section 354.6 as a purely procedural measure by reducing its scope to the provision regarding the limitations, as set forth in subsection (c). The entire effect of section 354.6, they argue, is to extend the statute of limitations for claims that are already available to remedy Nazi-era slave labor. They cite an impressive range of possible sources of substantive law prohibiting slave labor, including state statutes and common law, the United States Constitution, and international law. The reference in subsection (c) to "the applicable statute of limitations" supports their interpretation: If a statute of limitations is already "applicable," perhaps it is because subsection (c) contemplates a pre-existing cause of action, rather than a cause of action created under section 354.6.

However, section 354.6 can be viewed as purely procedural only when subsection (c) is viewed in isolation from the rest of the provision. Most important, the first sentence of subsection (b) explicitly creates a cause of action by providing that certain individuals "may bring an action" for certain wrongs. *See Verizon Md. Inc. v. Pub. Serv. Comm'n*, 535 U.S. 635, 122 S.Ct. 1753, 1759, 152 L.Ed.2d 871 (2002) (noting that language in a statute providing that party "may bring an action" "reads like the conferral of a private right of action"). Appellants' recitation of pre-existing causes of action for slave labor, whether under other statutes

or other bodies of law, is therefore fruitless. Regardless of any pre-existing law, the California legislature chose to create a specific cause of action for persons subjected to slave labor by the Nazis and their allies and sympathizers. If confirmation of this reading is required, it is found in those passages of section 354.6 that set forth the details of the new cause of action. The section defines the class of plaintiffs who may sue under that cause of action, *see* § 354.6(a)(1), (2), sets the method for measuring damages, *see* § 354.6(a)(3), and establishes a special rule regarding liability of corporations affiliated with the wrong-doer, *see* § 354.6(b). Even the language of the statute of limitations provision itself limits the application of the statute of limitations to "action[s] brought under this section," thus confirming that section 354.6 creates a cause of action.

Appellants' only remaining argument for the procedural nature of section 354.6 is its placement within the Code of Civil Procedure, in Title Two: Time of Commencing Civil Actions. However, where the meaning of a statutory provision is clear, we do not rely upon the location the legislature chose for it in its system of codification, *see Bass v. Stolper, Koritzinsky, Brewster & Neider, S.C.*, 111 F.3d 1322, 1328 (7th Cir.1997), just as we do not rely upon the headings and titles of sections in such circumstances. *Brotherhood of R.R. Trainmen v. Baltimore & Ohio R.R.*, 331 U.S. 519, 528-29, 67 S.Ct. 1387, 91 L.Ed. 1646 (1947). The reason for the placement of section 354.6 within the procedural code is, in any event, not difficult to explain: The most striking aspect of the section is, indeed, its statute of limitations, which would allow the commencement of a suit more than 60 years

after the occurrence of the injury. *Id.* Section 354.6's placement, therefore, does not change our view that the section is substantive in nature.

The parties debate whether section 354.6 is substantive or procedural primarily in the context of the Appellees' due process challenge, which we do not address. The substantive nature of the provision, however, is relevant also to the foreign affairs doctrine analysis in which we engage below, because a state is generally more likely to exceed the limits of its power when it seeks to alter or create rights and obligations than when it seeks merely to further enforcement of already existing rights and duties. Nevertheless, that distinction does not affect the outcome here. Our determination of the foreign affairs doctrine issue does not depend on our conclusion that section 354.6 is substantive law. Whether substantive or procedural, section 354.6 creates a special rule that applies only to a newly defined class of tort actions—actions brought by Second World War slave labor victims against the entities that enslaved them. This new rule profoundly alters the likelihood that such actions will succeed, by not only extending the statute of limitations for claims that were timely when the statute took effect (although we doubt that any such claims existed), but, far more important, by reviving claims that were already time-barred. In the latter instance, the statute upset the repose of potential defendants. Such a revival of liability—even civil liability—is troubling and raises serious due process questions. We need not address those questions here, however. The important point for our foreign affairs analysis is that the California legislature created—or at least

resurrected—a special class of tort actions, with the aim of rectifying wartime wrongs committed by our enemies or by parties operating under our enemies' protection.[4]

B. Foreign Affairs Doctrine Analysis

Appellees argue that section 354.6 exceeds California's power to engage in foreign affairs. We agree.[5]

The Constitution does not create an express, general power over foreign affairs but rather allocates particular powers related to foreign affairs to particular federal actors. It appoints the President as "Commander in Chief of the Army and Navy of the United States," U.S. Const., art. II, § 2, cl. 1, and authorizes him to "make Treaties, provided two thirds of the Senators present concur," to "appoint Ambassadors" with the "Advice and Consent of the Senate," *id.* cl. 2, and

4. Two decisions of the California Court of Appeal, one by the Second Appellate District and one by the Fourth, have recently addressed whether section 354.6 is substantive or procedural in nature. The decisions reached opposite conclusions. *Compare Mitsubishi Materials Corp. v. Superior Court*, 130 Cal.Rptr.2d 734, 2003 WL 253877, slip op. at 2 (Cal.Ct.App.2003) ("The legislation actually *creates* a state law claim which otherwise would not exist . . . .") *with Taiheiyo Cement Corp. v. Superior Court*, 129 Cal.Rptr.2d 451, 2003 WL 124284, slip op. at 24 (Cal.Ct.App. 2003) ("The sole purpose of section 354.6 is to extend the statute of limitations for common law claims for unpaid labor and personal injuries arising out of slave or forced labor."). Both decisions were issued after our opinion was sent to the Clerk for filing.

5. Some Appellants assert that federal jurisdiction is lacking over their claims. We address that issue below.

to "receive Ambassadors and other public Ministers," *id.* § 3. It grants to Congress the power to "lay and collect . . . Duties, Imposts, and Excises," to "provide for the common Defence," *id.* art. I, § 8, cl. 1, to "regulate Commerce with foreign Nations," *id.* art. I, § 8, cl. 3, to "establish an uniform Rule of Naturalization," *id.* cl. 4, to "define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations," *id.* cl. 10, to "declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water," *id.* cl. 11, to "raise and support Armies," *id.* cl. 12, to "provide and maintain a Navy," *id.* cl. 13, and to regulate "the land and naval forces," *id.* cl. 14.

While the Constitution allocates these foreign affairs powers specifically to the federal government, it also expressly prohibits the states from exercising certain foreign relations powers, including both some of those expressly allocated to the federal government and a few others. "No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal" or, without consent of Congress, "lay any Imposts or Duties on Imports or Exports," "keep Troops or Ships of War in time of Peace," "enter into any Agreement or Compact . . . with a foreign Power," or "engage in War, unless actually invaded." *Id.* § 10.

Because the Constitution mentions no general foreign affairs power, and because only a few specified powers related to foreign affairs are expressly denied the states, one might assume that, with certain exceptions, states are free to pursue their own foreign policies. This is not, however, the case. To the contrary, the Supreme Court has long viewed the

foreign affairs powers specified in the text of the Constitution as reflections of a generally applicable constitutional principle that power over foreign affairs is reserved to the federal government. The Court has sometimes expressed this principle in expansive terms, declaring, for example, that "[p]ower over external affairs is not shared by the States; it is vested in the national government exclusively." *United States v. Pink*, 315 U.S. 203, 233, 62 S.Ct. 552, 86 L.Ed. 796 (1942); *see also Chae Chan Ping v. United States*, 130 U.S. 581, 606, 9 S.Ct. 623, 32 L.Ed. 1068 (1889) (*The Chinese Exclusion Case*) ("For local interests the several States of the Union exist, but for national purposes, embracing our relations with foreign nations, we are but one people, one nation, one power.").

The implication of the general principle is that "even in [the] absence of a treaty" or federal statute, a state may violate the constitution by "establish [ing] its own foreign policy." *Zschernig v. Miller*, 389 U.S. 429, 441, 88 S.Ct. 664, 19 L.Ed.2d 683 (1968).[6] *Zschernig* concerned an Oregon statute that provided for escheat of estate property claimed by a nonresident alien unless United States citizens had reciprocal rights in the country of the alien's residence and foreign heirs in that country would have the right to receive the proceeds of Oregon estates without confiscation. *Id.* at 430-31, 88 S.Ct.

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6. The doctrine has been referred to as "dormant foreign affairs preemption," or simply as "the foreign affairs power." *See Gerling Global Reinsurance Corp. of Am. v. Low*, 240 F.3d 739, 751 n. 9 (9th Cir.2001) (internal quotation marks removed), *cert. granted sub nom. Am. Ins. Ass'n v. Low*, 71 U.S.L.W. 3373 (2003).

664. The Court held that, while a reciprocity statute of this sort was not facially invalid, probate courts applying it impermissibly relied on inquiries into the type of governments that obtain in particular foreign nations—whether aliens under their law have enforceable rights, whether the so-called "rights" are merely dispensations turning upon the whim or caprice of government officials, whether the representation of consuls, ambassadors, and other representatives of foreign nations is credible or made in good faith, whether there is in the actual administration in the particular foreign system of law any element of confiscation. *Id.* at 434, 88 S.Ct. 664. In short, the Court found that the application of the statute depended less on an evaluation of the stated law of a particular country than on whether that country's political system was legitimate in the view of the Oregon courts. *See id.* at 440, 88 S.Ct. 664 (noting that state courts had held that communist and fascist countries did not grant rights reciprocal to those of Oregonians). To condition the application of state law on the political system of a foreign country was "an intrusion by the State into the field of foreign affairs which the Constitution entrusts to the President and the Congress." *Id.* at 432, 88 S.Ct. 664.

Despite the broad language of *Pink* and the *Chinese Exclusion Case*, however, *Zschernig* is "[t]he only case in which the Supreme Court has struck down a state statute as violative of the foreign affairs power." *Int'l Ass'n of Indep. Tanker Owners v. Locke*, 148 F.3d 1053, 1069 (9th Cir.1998), *rev'd in part on other grounds sub nom. United States v. Locke*, 529 U.S. 89, 120 S.Ct. 1135, 146 L.Ed.2d 69 (2000). *Zschernig* has been applied sparingly, because the Supreme Court has held that a statute does not violate the constitution

where it merely has "some incidental or indirect effect in foreign countries." *Clark v. Allen*, 331 U.S. 503, 517, 67 S.Ct. 1431, 91 L.Ed. 1633 (1947) (upholding facially a statute similar to that subsequently struck as applied in *Zschernig*).[7]

Noting that "the federal government's foreign affairs power . . . . is rarely invoked by the courts," we have declined to invalidate under *Zschernig* a California statute with certain superficial similarities to section 354.6. *Gerling Global Reinsurance Corp. of Am. v. Low*, 240 F.3d 739, 752 (9th Cir.2001), *cert. granted sub nom. Am. Ins. Ass'n v. Low*, 71 U.S.L.W. 3373 (2003). *Gerling* concerned California's Holocaust Victim Insurance Relief Act, Cal. Ins. Code §§ 13800-13807 ("HVIRA"), which requires insurers doing business in California to file certain information about any insurance policies that they or companies "related" to them sold in Europe and that were in effect between 1920 a nd 1945. *Id.*; *see Gerling*, 240 F.3d at 743, 753. While recognizing that HVIRA involved foreign affairs, we held that it was constitutional because of the combination of two factors: first, "HVIRA, on its face, involves commerce

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7. Other courts have, however, invalidated statutes under foreign affairs doctrine. *See, e.g., Nat'l Foreign Trade Council v. Natsios*, 181 F.3d 38, 49-61 (1st Cir.1999) (invalidating Massachusetts law restricting ability of Massachusetts and its agencies to purchase goods or services from individuals or companies engaged in business with Burma), *aff'd on other grounds sub nom. Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 120 S.Ct. 2288, 147 L.Ed.2d 352 (2000); *Springfield Rare Coin Galleries, Inc. v. Johnson*, 115 Ill.2d 221, 236-37, 104 Ill.Dec. 743, 503 N.E.2d 300 (1986) (invalidating state statute excluding South African coins from otherwise generally applicable state tax exemptions).

alone"—and thus should be considered under the Supreme Court's foreign commerce cases rather than under the foreign affairs cases; and second, HVIRA "is not, on its face, directed at any particular foreign country"—and thus is comparatively unlikely to interfere with the foreign relations of the federal government. *Id.* at 753.

While *Gerling* shows that the general prohibition against state involvement with external affairs is not as broad as some judicial statements would imply, it also suggests a mode of analysis that is relevant to the cases before us. In particular, *Gerling* distinguishes among statutes according to the foreign affairs functions that they implicate. *Gerling* suggests that statutes that "mainly involve foreign commerce" are among those least likely to be held invalid under the foreign affairs power. *Id.* The regulation of commerce is simply not central to the foreign affairs power that is off limits to states.[8] For present purposes, we must consider the importance to foreign affairs analysis of another subset of foreign affairs powers: the power of the federal government to make and to resolve war, including the power to establish the procedure for resolving war claims.

While neither the Constitution nor the courts have defined the precise scope of the foreign relations power that

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8. State regulation of foreign commerce might, however, exceed constitutional limitations under other constitutional doctrines. *See, e.g., Barclays Bank PLC v. Franchise Tax Bd.*, 512 U.S. 298, 328, 114 S.Ct. 2268, 129 L.Ed.2d 244 (1994) (considering whether state's international tax reporting system violated either dormant commerce clause or federal government's ability to speak in "one voice.")

is denied to the states, it is clear that matters concerning war are part of the inner core of this power. Of the eleven clauses of the Constitution granting foreign affairs powers to the President and Congress, *see supra*, seven concern preparing for war, declaring war, waging war, or settling war.[9] Most of the Constitution's express limitations on states' foreign affairs powers also concern war.[10] Even those foreign affairs powers in the Constitution that do not expressly concern war and its resolution may be understood, in part, as a design to *prevent* war. Indeed, as the *Federalist* shows, supporters of the new Constitution believed that disunity in international affairs risked unnecessary war. *See, e.g.*, THE FEDERALIST, NO. 3, at 13 (Clinton Rossiter ed., 1961) ("[F]ewer just causes of war will be given by the national government, [and] it will also be more in their power to accommodate and settle them amicably."). The Supreme Court cases under the foreign affairs power have also been driven, in part, by this concern. Thus the inheritance provision at issue in *Zschernig*, although superficially unrelated to war, was seen by a Court operating at the height of the Cold War as a potential provocation to

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9. *See* U.S. Const., art. II, § 2, cl. 1 (making President Commander in Chief); *id.* cl. 2; (authorizing President to make treaties with advice and consent of Senate); *id.* art. I, § 8, cl. 1 (authorizing Congress to "provide for the common Defence"); *id.* cl. 11 (authorizing Congress to declare war); *id.* cl. 12 (authorizing Congress to raise and support armies); *id.* cl. 13 (authorizing Congress to "provide and maintain a Navy"); *id.* cl. 14 (authorizing Congress to regulate "the land and naval forces").

10. *See id.* § 10 (prohibiting states from entering "any Treaty, Alliance, or Confederation," or, without congressional authorization, from "keep[ing] Troops or Ships of War in time of Peace" and from "engag[ing] in War, unless actually invaded.")

foreign powers. " 'Experience has shown,' " the Court wrote in striking the provision, " 'that international controversies of the gravest moment, sometimes even leading to war, may arise from real or imagined wrongs to another's subjects inflicted, or permitted, by a government.' " 389 U.S. at 441, 88 S.Ct. 664 (quoting *Hines v. Davidowitz*, 312 U.S. 52, 64, 61 S.Ct. 399, 85 L.Ed. 581 (1941)). Matters related to war are for the federal government alone to address.

Among the six district court decisions we review here, the only one to reach the foreign affairs challenge to section 354.6 held that the provision was unconstitutional under that doctrine for six reasons:

> (1) the terms of section 354.6 and its legislative history demonstrate a purpose to influence foreign affairs directly, (2) the statute targets particular countries, (3) the statute does not regulate an area that Congress has expressly delegated to states to regulate, (4) the statute establishes a judicial forum for negative commentary about the Japanese government and Japanese companies, (5) the Japanese government asserts that litigation of these claims could complicate and impede diplomatic relationships of the countries involved, and (6) the United States, through the State Department, contends that section 354.6 impermissibly intrudes upon the foreign affairs power of the federal government.

Forced Labor (*Koreans*), 164 F.Supp.2d at 1173. Although we agree that section 354.6 violates the foreign affairs power, we base our holding on a narrower consideration. We hold that section 354.6 is impermissible because it intrudes on the federal government's exclusive power to make and resolve war, including the procedure for resolving war claims.

With section 354.6, California seeks to redress wrongs committed in the course of the Second World War. By its terms, only "Second World War slave labor victims" and "Second World War forced labor victims" can bring suit under the provision. § 354.6(b). The wrong-doers under the statute—the enslaving individuals or entities—include "the Nazi regime, its allies and sympathizers, or enterprises transacting business in any of the areas occupied by or under control of the Nazi regime or its allies or sympathizers." § 354.6(a)(1), (2). The governmental entities are, by definition, wartime enemies of the United States, while the "enterprises" identified in the provision, if not themselves our wartime enemies, were operating in enemy territory and presumably—no party disputes this—with the consent and for the benefit of our wartime enemy. Wrongs committed after the end of the war are not cognizable under section 354.6; the provision concerns only acts that took place during the years leading up to the war and during the years of the war itself. *Id.* In short, California has sought to create its own resolution to a major issue arising out of the war—a remedy for wartime acts that California's legislature believed had never been fairly resolved.

Appendix A

The United States has already exercised its own exclusive authority to resolve the war, including claims arising out of it. It did not choose, however, to incorporate into that resolution a private right of action against our wartime enemies or their nationals. The United States resolved the war against Germany by becoming a party to a number of treaties and international agreements, beginning with the 1945 agreements at Yalta and Potsdam, in which the United States, Britain, and the Soviet Union agreed to extract reparations from Germany and its nationals but did not include a private right of action against either. *See* Protocol of the Proceedings, Berlin (Potsdam) Conference, Aug. 2, 1945, art. (B)(111), 3 Bevans 1207. Subsequent agreements also failed to create a private right of action, including the Paris Reparations Treaty of 1946 between the United States and 17 other nations, Agreement on Reparations From Germany, Jan. 14, 1946, 61 Stat. 3157, T.I.A.S. 1655 ("Paris Reparations Treaty"); the Transition Agreement of 1952 between the Western Powers and the Federal Republic of Germany, Convention Between the United Kingdom of Great Britain and Northern Ireland, France, the United States of America and the Federal Republic of Germany on the Settlement of Matters Arising Out of the War and the Occupation, May 26, 1952 (as amended by Schedule IV to the Protocol on the Termination of the Occupation Regime in the Federal Republic of Germany, Oct. 23, 1954), 6 U.S.T. 4117, 331 U.N.T.S. 219; the London Debt Agreement of 1953 between the United States and 20 other nations, Agreement on German External Debts, Feb. 27, 1953, 4 U.S.T. 443, 333 U.N.T.S. 3; and the Two-Plus-Four Treaty, which reunified Germany and became effective on March 15, 1991, Treaty on the Final Settlement with Respect to Germany, Sept. 12,

1990, 29 I.L.M. 1186.[11] Most recently, the Foundation Agreement of July 17, 2000, an executive agreement between the governments of Germany and the United States, provided a limited form of remedy for claimants such as Deutsch. Agreement Between the Government of the United States of America and the Government of the Federal Republic of Germany Concerning the Foundation "Remembrance, Responsibility and the Future." The Foundation was created by Germany, in negotiation with the United States, five

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11. For useful and accessible surveys of these agreements as they apply to war reparations, see *Iwanowa v. Ford Motor Co.*, 67 F.Supp.2d 424, 448-56 (D.N.J.1999), and *Burger-Fischer v. DeGussa AG*, 65 F.Supp.2d 248, 265-73 (D.N.J.1999). The district court in *Deutsch* relied heavily on these cases and adopted their conclusion that Deutsch's claim raised a nonjusticiable political question, *Deutsch*, 2000 WL 33957691, at 2-6, a conclusion with which we disagree. The district court determined that the postwar agreements created the exclusive remedy to the matters raised by Deutsch, and that to order relief would therefore require the court to interfere with the foreign affairs choices of the political branches. *Id.* Under political question doctrine, the court noted, it is impermissible for a court to make policy related to foreign affairs. *Id.* at 2 (citing *Baker v. Carr*, 369 U.S. 186, 211, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962)). Therefore, the district court supposed, *Deutsch* raised a nonjusticiable political question. The problem with this argument is that it makes every dispute over the proper application of a treaty into a political question, because treaties inherently involve foreign affairs. No political question, however, is raised by the simple application of the requirements of a treaty to which the United States is a party. Treaties have the force of law, *see Missouri v. Holland*, 252 U.S. 416, 40 S.Ct. 382, 64 L.Ed. 641 (1920), and, if they are self-executing or have been implemented through legislation, must be applied by the courts. *See United States v. Alvarez-Machain*, 504 U.S. 655, 667, 112 S.Ct. 2188, 119 L.Ed.2d 441 (1992).

Central and Eastern European countries, Israel, and the non-governmental Conference on Jewish Material Claims Against Germany, for the purpose of making payments to people who suffered at the hands of German companies during the Nazi Era. It provides for payment of up to 15,000 German Marks (roughly $7500) to individual claimants who were subjected to forced labor. *See id.* at Annex A. We do not have the authority to consider the adequacy of such payments here. Indeed, we acknowledge that no possible compensation could be sufficient to remedy the harm done to Holocaust victims and their families.

No party argues that any of these agreements provides the authority for a state of the United States to create a private right of action enabling individuals to recover for wartime injuries against German corporations. Deutsch argues, however, that the terms of these various agreements do not *prohibit* a state from creating such a right of action, and that in the absence of such a prohibition, his action may proceed. Deutsch's argument cannot carry the day. As we explained earlier, the Constitution allocates the power over foreign affairs to the federal government exclusively, and the power to make and resolve war, including the authority to resolve war claims, is central to the foreign affairs power in the constitutional design. In the absence of some specific action that constitutes authorization on the part of the federal government, states are prohibited from exercising foreign affairs powers, including modifying the federal government's resolution of war-related disputes.

Appendix A

The war with Japan ended with the Treaty of Peace, signed in San Francisco, on September 8, 1951, by the representatives of the United States and 47 other Allied powers and Japan, and ratified by the United States Senate on April 28, 1952. Treaty of Peace with Japan, Sept. 8, 1951, 3 U.S.T. 3169, T.I.A.S. No. 2490. Although the parties dispute whether that treaty by its own terms precludes the claims brought by any of the Appellants,[12] that is the only dispute regarding the treaty. No party asserts that the treaty either creates—explicitly or implicitly—a private right of action against Japan or its nationals, or authorizes states of the United States to create such a right.[13] Once again, without

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12. The central disagreement concerns the meaning of Article 14(b) of the treaty, which is quoted in full *supra* note 3. The district judge held that Appellants' claims were waived because they are claims of Allied nationals "arising out of actions taken by [Japanese] nationals in the course of the prosecution of the war." *Id.*; *Forced Labor* (*Allied I*), 114 F.Supp.2d at 944-49. Appellants argue that the actions of the Appellee corporations were not taken "in the course of the prosecution of the war," or that it is an issue of fact whether they were or not.

13. Appellants do assert that, if Article 14 of the treaty waives claims against Japanese nationals, as Appellees assert, then Article 14 is superceded by Article 26. Article 26 provides, in pertinent part:

> Should Japan make a peace settlement or war claims settlement with any State granting that State greater advantages than those provided by the present Treaty, the same advantages shall be extended to the parties to the present Treaty.

(Cont'd)

such authorization, states lack the power to alter the federal government's resolution of disputes relating to the war.[14]

The grievances of at least one class of potential plaintiffs identified in section 354.6, prisoners of war, were addressed by the federal government in domestic legislation. *See* § 354.6(a)(2). Under the War Claims Act of 1948, 50 U.S.C. app. §§ 2001-2017p, assets seized from Germany, Japan, or their nationals within the United States and its territory

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(Cont'd)

Treaty of Peace with Japan, at art. 26. Appellants argue that other foreign states have entered into agreements with Japan that do not waive private claims and that those agreements thereby extend to those foreign states "greater advantages" than the terms extended to the United States. The district court found that Article 26 confers rights only on the "parties" to the treaties, not on individuals. *Forced Labor* (*Allied I*), 114 F.Supp.2d at 949. We agree, at least as to the right to invoke the clause. It is the prerogative of the United States, not of California or of Appellants, to determine whether a foreign state has been granted greater advantages and, if so, whether it is in the interest of the United States to incorporate those advantages (along with any concomitant lesser disadvantages) into the treaty. The United States has not invoked Article 26 to authorize a private right of action. Appellants' reliance on the article is, therefore, unavailing.

14. It is immaterial that many of the Appellants are nationals of two nations, China and Korea, that were not signatories of the San Francisco treaty. When the United States has been a party to a war, the resolution it establishes to that war is the resolution for the whole of the United States. States lack the power to modify that resolution, regardless of the citizenship of those seeking redress.

were used to compensate American prisoners of war whose rights had been violated. *See* U.S. Foreign Claims Settlement Commission, Settlement of Claims by the Foreign Claims Settlement Commission from September 14, 1949 TO MARCH 31, 1955, at 10-11 (1955); 50 U.S.C. app. § 2005(d)(2)(A). The Act required prisoners of war to submit their claims to a federal agency, whose decision was final; it conceived of no private right of action against German or Japanese entities. *See* 50 U.S.C. app. § 2010.

California was dissatisfied with how the federal government chose to address the various wartime injuries suffered by victims of the Nazis and their allies after the United States brought the Second World War to a close. The California legislature found that, under the treaties and compensatory programs that the federal government had established, "victims of Nazi persecution have been deprived of their entitlement to compensation for their labor and for injuries sustained while performing that labor as forced or slave laborers prior to and during the Second World War." 1999 Cal. Stat. 216, § 1(b) (codified in notes to Cal. Code Civ. Proc. § 354.6). The state legislature therefore enacted section 354.6 to remedy these 54-year-old injuries in a manner favored by California but not provided for by the federal government. Appellants assert that no international agreement or other federal action prohibits California from doing so. However, as we have stated, because the issue is the lack of state power, it is immaterial whether the federal government enacted a prohibition. The federal government, acting under its foreign affairs authority, provided its own

resolution to the war; California has no power to modify that resolution.[15]

Before concluding our discussion of this issue, we must consider Appellants' most vigorous argument in favor of the

15. One might argue that the Holocaust was distinct from the German war effort, that claims for injuries arising from the Holocaust do not, therefore, relate to the war, and that such injuries, because they are unrelated to the war, do not implicate the war powers of the federal government. We need not assume that the acts of enslavement encompassed by section 354.6 served military purposes or advanced the war effort of the Nazis or their allies. We simply note that, by its terms, section 354.6 creates a right of action only for "Second World War" slave labor victims. For the purposes of the provision, the California legislature explicitly defined the harms suffered by such victims as pertaining to the war. Moreover, the federal government's exclusive power to resolve the war necessarily includes an exclusive power to address the injuries that section 354.6 attempts to remedy. The treaties themselves confirm that the federal government regarded all wartime injuries as matters integral to peacemaking, regardless of the purpose or effect of the wrong-doer's acts. In the Paris Reparations Treaty, for example, the United States and the other signatories "agree[d] among themselves that their shares of reparation, as determined by the present Agreement, shall be regarded by each of them as covering all its claims and those of its nationals against the former German Government and its Agencies, of a governmental or private nature arising out of the war." Paris Reparations Treaty, Jan. 14, 1946, art. 2(A), 61 Stat. 3157, 3163; *see also*, *e.g.*, Treaty of Peace with Hungary, Feb. 10, 1947, art. 30(4), 61 Stat. 2109, 2126 (bilateral treaty between Allied Powers and Hungary) ("Hungary waives on its own behalf and on behalf of Hungarian nationals all claims against Germany and German nationals outstanding on May 8, 1945, except those arising out of contracts and other obligations entered into, and rights acquired, before September 1, 1939.").

constitutionality of section 354.6: that the provision "presents striking parallels" to HVIRA, the insurance reporting requirement that we upheld in *Gerling*. Appellants correctly note two points of similarity: first, like section 354.6, HVIRA is related to Nazi-era wrongs; second, as under section 354.6, at least as applied to the cases before us, the parties regulated by HVIRA are businesses. The similarity ends there, however. Unlike section 354.6, HVIRA does not attempt to require the affected businesses to compensate victims for past wrongs: Specifically, as we noted in *Gerling*, HVIRA does not impose obligations on "European insurance companies to pay or not to pay claims on European policies." *Gerling*, 240 F.3d at 745 (internal quotation marks removed). HVIRA, rather, is merely a reporting requirement and the only consequence of noncompliance is the inability to do business in California in the future. *Id.* Whereas section 354.6 seeks to provide a monetary remedy for decades-old wartime wrongs, HVIRA is a forward-looking regulatory statute.[16] In short, unlike section 354.6, HVIRA does not attempt to hold defendants liable for their past wartime conduct; it therefore does not implicate the exclusive power of the federal government to make and resolve war, including the resolution of claims arising out of such actions.

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16. Appellants in *Gerling* originally challenged two other statutes that did attempt to force payment of Nazi-era insurance claims, *see* Cal. Code Civ. Proc. § 354.5; Cal. Ins.Code § 790.15, but those claims were dismissed for lack of standing and not addressed on appeal. *Gerling*, 240 F.3d at 745; *see also Gerling Global Reinsurance Corp. of Am. v. Low*, 296 F.3d 832, 842 & n. 7 (9th Cir.2002), *cert. granted sub nom. Am. Ins. Ass'n v. Low*, 71 U.S.L.W. 3373 (2003).

Section 354.6 runs afoul of the restriction on the exercise of foreign affairs powers by the states. Because California lacks the power to create a right of action—or, alternatively, to resurrect time-barred claims—in order to provide its own remedy for war-related injuries inflicted by our former enemies and those who operated in their territories, we hold that section 354.6 is unconstitutional.

III. Statutes of Limitations

In addition to section 354.6, Appellants bring various tort claims under common law, California statutory and constitutional law, as well as for violations of international law under the Alien Tort Claims Act, 28 U.S.C. § 1350 ("ATCA"). *See supra.* All these claims are barred by their respective statutes of limitations.

Appellants apparently bring their common law claims under California law, although in many instances they do not identify the jurisdiction under whose law they seek relief. Some of the parties, including both defendants and plaintiffs, are California residents, while others are not; the alleged injuries all took place outside of California. Regardless of the source of the substantive law, because all the claims, including both common law and statutory, were brought in California state court or in a district court within California, we apply to them the statute of limitations that would be applied in California state court.[17] California applies the "governmental interest" approach to conflict of law issues.

17. The district court addressing the claims brought by Korean and Chinese Appellants found that the non-federal claims would be time-barred under Chinese and Japanese law, as well as under the law of California. *Forced Labor* (*Koreans*), 164 F.Supp.2d at 1182.

Hurtado v. Superior Court, 11 Cal.3d 574, 579-80, 114 Cal.Rptr. 106, 522 P.2d 666 (1974). Under this approach, the correct choice of law depends on "an analysis of the respective interests of the states involved." *Id.* at 579, 114 Cal.Rptr. 106, 522 P.2d 666. Where the conflict concerns a statute of limitations, the governmental interest approach generally leads California courts to apply California law. Witkin, 3 CALIFORNIA PROCEDURE § 104 (4th ed.1996); *see, e.g.*, *Peterson v. Kennedy*, 771 F.2d 1244, 1251 n. 4 (9th Cir.1985); *American Bank of Commerce v. Corondoni*, 169 Cal.App.3d 368, 215 Cal.Rptr. 331 (1985), and especially so where California's statute would bar a claim. California's interest in applying its own law is strongest when its statute of limitations is shorter than that of the foreign state, because a "state has a substantial interest in preventing the prosecution in its courts of claims which it deems to be 'stale.' Hence, subject to rare exceptions, the forum will dismiss a claim that is barred by its statute of limitations." Restatement (Second) of Conflict of Laws § 142, cmt. f (1988).

All the claims in the cases before us, other than those under the ATCA, have been stale for several decades under the applicable California statutes of limitations. *See* Cal. Code Civ. Proc. § 340 (one-year statute for personal injury torts, wrongful death and false imprisonment); *id.* § 338 (three-year statute for taking of or injury to personal property, and for fraud); Cal. Bus. & Prof. Code § 17208 (four-year statute for claims of unfair business practices). Only an extraordinarily strong interest of a foreign state in keeping these claims alive could overcome the presumption that California will not hear claims that have been stale for so long under its own law. No such strong foreign interest has been demonstrated here.

The statute of limitations under the ATCA is 10 years. *Doe v. Unocal Corp.*, __ F.3d __ (9th Cir.2002), 2002 U.S. App. LEXIS 19263, at *27.[18] Appellants have thus brought these claims far too late as well.[19]

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18. The 10-year limit is not stated in the provision. Rather, we adopted it from the Torture Victim Protection Act, *see* Pub.L. No. 102-256, 106 Stat. 73 (1992) (codified at 28 U.S.C. § 1350, statutory notes) ("TVPA"), which has an explicit 10-year statute. *Papa v. United States*, 281 F.3d 1004, 1011-13 (9th Cir.2002). We did so because where a federal statute lacks a specified statute of limitations, courts apply the limitations period provided by the jurisdiction in which they sit unless "a rule from elsewhere in federal law clearly provides a closer analogy than available state statutes, and when the federal policies at stake and the practicalities of litigation make that rule a significantly more appropriate vehicle for interstitial lawmaking."

Papa, 281 F.3d at 1011-12 (citing *North Star Steel Co. v. Thomas*, 515 U.S. 29, 35, 115 S.Ct. 1927, 132 L.Ed.2d 27 (1995)). We held that ATCA was closely analogous to the TVPA both in its purpose and in its mechanism for achieving that purpose. *Papa*, 281 F.3d at 1012. Appellants ask us to reconsider our decision in *Papa*, at least as it applies to the present cases, and hold that the ATCA is more closely analogous to section 354.6 than to the TVPA. The result, Appellants argue, would be that the claims are not barred until 2010. For the reasons we stated in *Papa*, and because we hold that section 354.6 is unconstitutional, we reaffirm that the ATCA statute of limitations in this case, as in other cases, is 10 years.

19. Some Appellants who did not bring a claim under the ATCA argue that they should be permitted to amend their complaints to do so. In light of our holding, such an amendment would be futile.

Some Appellants contend, however, that their claims under both state law and the ATCA are equitably tolled and could therefore survive our invalidation of section 354.6. Although the district court found that they did not allege facts sufficient to trigger equitable tolling, these Appellants contend that they were not required to allege such facts, because a statute of limitations is an affirmative defense, which a plaintiff is not required to anticipate in the complaint. They also contend that even if they were required to allege such facts, the district court should have granted them leave to amend in order to give them the ópportunity to do so. The curious aspect of this argument is that all of the Appellants who make this argument *did* plead equitable tolling in their complaints. Furthermore, they alleged *facts* that they believed would trigger such tolling. They alleged, for example, that the defendants had kept the plaintiffs ignorant of essential facts in the defendants' possession. The district court considered these alleged facts and found them insufficient to trigger tolling. *Forced Labor* (*Koreans*), 164 F.Supp.2d at 1181-82. Although the court's discussion of equitable tolling concerned only the ATCA, its reasoning applies equally to the state law claims. On appeal, these Appellants offer neither a satisfactory answer to the district court's finding regarding equitable tolling nor any hint of any additional facts that they might allege in an amended complaint. Under these circumstances, amendment would be futile. We therefore find no abuse of discretion in the district court's dismissal of the complaints with prejudice.[20]

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20. Deutsch argues for the first time on appeal that he should be permitted to amend his complaint to include a claim under the TVPA. He offers no explanation, however, for why he failed to bring

(Cont'd)

IV. Jurisdiction

In many of the cases before us, there is indisputable federal jurisdiction. In some, for example in *Deutsch* and in *Dunn v. Nippon Steel Corp.*,[21] there is diversity jurisdiction. 28 U.S.C. § 1332. Appellants in several other cases, for

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(Cont'd)

that claim in his first amended complaint. Moreover, as noted above, the TVPA has an explicit statute of limitation of 10 years. Deutsch argues that that period commenced on the effective date of the Act, rather than on the date on which the injury was complete. He cites no authority for this proposition, and we do not find it to be a reasonable or plausible one. As Deutsch notes, we have held that the TVPA is applicable to acts that took place prior to the effective date of the Act. *Alvarez-Machain v. United States*, 107 F.3d 696, 702-03 (9th Cir.1996). In *Alvarez-Machain*, however, the plaintiff filed his claim only three years after the date of the alleged injury. *Id.* at 700. Nothing in our cases or the statute suggests that Congress intended the TVPA to open the federal courts to claims that were already more than 40 years old when the statute became effective or that no time limit exists under the TVPA as to the resurrection of claims for damages that may have occurred in the far distant past. Because the TVPA has a 10-year statute of limitations, permitting Deutsch to amend his complaint would be futile. We therefore affirm the dismissal with prejudice.

21. In *Dunn*, the amount in controversy is not stated in the complaint, nor was the amount determined by the district court. However, the Appellant seeks compensation and punitive damages for roughly three years of withheld wages, as well as for severe physical and mental injuries he suffered at the hands of the defendants and their predecessors during that time. There is thus no doubt that this case meets the $75,000 minimum amount in controversy required for diversity jurisdiction under 28 U.S.C. § 1332.

example in *Terrence v. Mitsui & Co.*, *Wheeler v. Mitsui & Co.*, and *Kim v. Ishikawajima Harima Heavy Indus. Co.*, assert claims under international law, thus giving rise to federal subject matter jurisdiction under 28 U.S.C. § 1331.

Among the many cases that have been consolidated, there are some individual cases as to which federal jurisdiction may be uncertain. Appellants in those cases originally sought relief in state court, under state law,[22] against non-diverse defendants. After removal and consolidation, some of the Appellants sought remand to state court. The district court denied their motions, *Forced Labor* (*Allied I*), 114 F.Supp.2d at 943, on the ground that "the complaints . . . , on their face, implicate the federal common law of foreign relations." *Id.* Appellees opposed remand on other grounds as well. Appellants in some of these cases—not precisely the same group that moved for remand below—now argue that federal jurisdiction is lacking.

Normally, of course, we would address all jurisdictional issues as an initial matter, as they would determine whether we could proceed to the merits. The situation is different with respect to the cases consolidated here, because the cases over which jurisdiction is disputed raise no merits issues that are not also raised by one or more cases over which jurisdiction is certain and which have been consolidated with the disputed cases. In short, we are compelled to address all of the merits issues in these consolidated cases, regardless

22. Although some plaintiffs amended or sought to amend their complaints, after removal, to include federal claims, such amendments do not bear on the evaluation of removal jurisdiction. *Abada v. Charles Schwab & Co.*, 300 F.3d 1112, 1117 (9th Cir.2002).

of whether there is jurisdiction over each of them. Furthermore, the ultimate survival of all of these cases depends on the validity of the provisions of section 354.6. In light of our holding that section 354.6 is unconstitutional, remand to state court of the cases of uncertain federal jurisdiction would be futile, as the state court would simply dismiss the claims with prejudice. *See Bates v. Jones*, 127 F.3d 870, 873 (9th Cir.1997) (noting that the California Supreme Court "has yet to disregard a directly applicable decision of this court on a question of federal law"). Therefore, our determination of the uncertain jurisdictional issues could have no effect on the outcome of any of the cases.

For these reasons, we decline to address the uncertain jurisdictional issues and simply affirm the district court's dismissal of all the cases before us.

Conclusion

For the foregoing reasons, we hold that California Code of Civil Procedure section 354.6 is an unconstitutional intrusion on the foreign affairs power of the United States and that Appellants' remaining claims are barred by the applicable statutes of limitations. The judgments of the district courts are

AFFIRMED.

Appendix A

ORDER AMENDING OPINION AND DENYING PETITIONS FOR REHEARING AND REHEARING EN BANC

REINHARDT, Circuit Judge.

The opinion filed January 21, 2003 is hereby amended as follows:

1. Slip op. at 991, second full paragraph, line 6, after "because a state is," insert "generally."

2. Slip op. at 991, replace the last sentence (beginning "Because section 354.6 is substantive law"), including footnote 4, with the following:

> Nevertheless, that distinction does not affect the outcome here. Our determination of the foreign affairs doctrine issue does not depend on our conclusion that section 354.6 is substantive law. Whether substantive or procedural, section 354.6 creates a special rule that applies only to a newly defined class of tort actions—actions brought by Second World War slave labor victims against the entities that enslaved them. This new rule profoundly alters the likelihood that such actions will succeed, by not only extending the statute of limitations for claims that were timely when the statute took effect (although we doubt that any such claims existed), but, far more important, by

reviving claims that were already time-barred. In the latter instance, the statute upset the repose of potential defendants. Such a revival of liability—even civil liability—is troubling and raises serious due process questions. We need not address those questions here, however. The important point for our foreign affairs analysis is that the California legislature created—or at least resurrected—a special class of tort actions, with the aim of rectifying wartime wrongs committed by our enemies or by parties operating under our enemies' protection.

3. Immediately following the passage inserted above (after "under our enemies' protection") add a new footnote containing the following text:

> Two decisions of the California Court of Appeal, one by the Second Appellate District and one by the Fourth, have recently addressed whether section 354.6 is substantive or procedural in nature. The decisions reached opposite conclusions. *Compare Mitsubishi Materials Corp. v. Superior Court*, 130 Cal. Rptr.2d 734, 2003 WL 253877, slip op. at 2 (Cal.Ct.App.2003) ("The legislation actually *creates* a state law claim which otherwise would not exist. . . .") *with Taiheiyo Cement Corp. v. Superior Court*, 129 Cal.Rptr.2d 451, 2003 WL 124284, slip op. at 24 (Cal.Ct.

App.2003) ("The sole purpose of section 354.6 is to extend the statute of limitations for common law claims for unpaid labor and personal injuries arising out of slave or forced labor."). Both decisions were issued after our opinion was sent to the Clerk for filing.

4. Slip op. at 1005, replace the first full paragraph with the following:

> Section 354.6 runs afoul of the restriction on the exercise of foreign affairs powers by the states. Because California lacks the power to create a right of action—or, alternatively, to resurrect time-barred claims—in order to provide its own remedy for war-related injuries inflicted by our former enemies and those who operated in their territories, we hold that section 354.6 is unconstitutional.

With these amendments, the panel has voted unanimously to deny the petitions for rehearing and rehearing en banc. The full court has been advised of the petitions for rehearing en banc, and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R.App. P. 35. The petitions for rehearing and rehearing en banc are denied.

The mandate will be held pending a decision in *American Insurance Association v. Garamendi*, __ U.S. __, 123 S.Ct. 817, 154 L.Ed.2d 768 (2003) (No. 02-722) (granting certiorari).

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA FILED SEPTEMBER 17, 2001

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

Master File No. MDL-1347

ORDER NO. 10

IN RE:

WORLD WAR II ERA JAPANESE FORCED LABOR LITIGATION,

This Document Relates To:

Choe v. Nippon Steel Corp., et al.,
ND Cal. No. 99-5309
Kim v. Ishikawajima Harima Heavy Industries Co., Ltd., et al.,
ND Cal. No. 99-5303
Oh v. Mitsui & Co., Ltd., et al.,
ND Cal. No. 00-3752
Sin v. Mitsui & Co., Ltd., et al.,
ND Cal. No. 00-3242
Su v. Mitsubishi Corp., et al.,
ND Cal. No. 00-3586
Sung, et al. v. Mitsubishi Corp., et al.,
ND Cal. No. 00-2358
Ma v. Kajima Corp., et al.,
ND Cal. No. 01-2592

Appendix B

The seven above-captioned cases are the only class actions remaining before the court in a set of consolidated cases in which World War II veterans forced to labor without compensation during World War II seek damages and other remedies from Japanese corporations or their successors in interest. These cases are brought by plaintiffs of Korean and Chinese descent. The other matters, which involved United States and Allied veterans, were previously dismissed because the 1951 Treaty of Peace with Japan waived all such claims. *In re World War II Era Japanese Forced Labor Litigation*, 114 F. Supp. 2d 939, 942 (N.D. Cal.. 2000) (Order No. 4); *see also* Order No. 9. Defendants seek dismissal of the present cases as well.

The Korean and Chinese plaintiffs assert essentially the same claims as the United States and Allied veterans. Their primary cause of action arises under a statute enacted by the California legislature in 1999, California Code of Civil Procedure § 354.6. The statute attempts to provide a cause of action for all individuals forced to labor without compensation by "the Nazi regime, its allies and sympathizers, or enterprises transacting business in any of the areas occupied by or under control of the [same regimes]" by extending the applicable statute of limitations to December 31, 2010. Cal. CCP § 354.6(a), (c). The crux of section 354.6 states:

> Any Second World War slave labor victim, or heir of a Second World War slave labor victim, Second World War forced labor victim, or heir of a Second World War forced labor victim, may bring an action to recover compensation for labor

> performed as a Second World War slave labor victim or Second World War forced labor victim from any entity or successor in interest thereof, for whom that labor was performed, either directly or through a subsidiary or affiliate.

Id., subsection (b). The statute does not limit the cause of action to California residents. *See id.*, subsection (a).

The Korean and Chinese plaintiffs also seek compensation and restitution under various other state laws, and two of the seven complaints assert violations of international law.

Defendants argue that these cases must be dismissed for several reasons. Most significantly, defendants contend that section 354.6 is unconstitutional as applied against them. Notice of Claim of Unconstitutionality (Doc. # 243); Def. Br. (Doc. # 210) at 19-21; Def. Supp. Br. (Doc. # 336) at 1; *see also* United States Statement of Interest (SOI) (Doc. # 302) at 12-17. Defendants argue that application of the statute is unconstitutional because it infringes upon the federal government's exclusive power over foreign affairs and violates the Due Process clause of the Constitution.

Defendants also seek dismissal based on the following arguments: (1) the claims of these plaintiffs are barred by the applicable statute of limitations, (2) the 1951 Treaty of Peace with Japan and subsequent treaties entered by Japan with Korea and China combine to bar the claims, (3) the claims raise nonjusticiable political questions, (4) consideration of the claims violates the principles of international comity, (5) evaluating the claims would contravene the act of state

doctrine, (6) the doctrine of forum non conviens precludes this litigation in California and (7) the claims contravene the doctrine of foreign sovereign immunity.

The court concludes that section 354.6 is unconstitutional as applied to defendants in the case at bar because it infringes on the federal government's exclusive power over foreign affairs. To the extent the Korean and Chinese plaintiffs could assert claims under any other law, they are barred by the applicable statute of limitations and other principles of law.

I

Defendants move to dismiss pursuant to both FRCP 12(b)(6) and 12(c). Defendants move under both provisions because, consistent with the defendants in the Allied matters, some of the defendants have filed answers in the present cases while others have not. As the court noted in Order No. 4, the distinction between the two approaches is not important. The Ninth Circuit instructs that the standard for assessing a FRCP 12(c) motion is the same as the standard for a FRCP 12(b)(6) motion. *See Enron Oil Trading & Transp. Co. v. Walbrook Ins. Co.*, 132 F.3d 526, 529 (9th Cir. 1997) (citations omitted). On such motions, all material allegations in the complaint at issue must be taken as true and construed in the light most favorable to the plaintiff. *Pillsbury, Madison & Sutro v. Lerner*, 31 F.3d 924, 928 (9th Cir. 1994). Dismissal is only appropriate when it "appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). These cases are subject to dismissal based on questions of law only.

Appendix B

II

As touched upon above, the present cases involve plaintiffs of Korean and Chinese descent. These cases require analysis separate from the cases dismissed earlier not because the Korean and Chinese plaintiffs assert claims that are distinct from the claims of the United States and Allied veterans, but because the cases are brought on behalf of nationals of countries that were not signatories to the 1951 Treaty of Peace with Japan. The treaty was signed only by representatives of the United States and 47 other Allied powers and Japan. *See* Treaty of Peace with Japan, [1952] 3 UST 3169, TIAS No. 2490 (1951) (hereinafter, Treaty). Due to various historical and political circumstances during the time the treaty was negotiated and finalized, neither Korea nor China became a signatory to the treaty. *See* U.S. Dept of State, Record of Proceedings at the Conference for the Conclusion and Signature of the Treaty of Peace with Japan 84-85 (1951) (Exhibits in Support of Motion to Dismiss (Doc. # 212), Exh. B). As the chief negotiator for the United States, John Foster Dulles explained at the time that Korea was not a signatory because technically Korea was part of Japan until the war ended, and thus "Korea was never at war with Japan." *Id.* at 84. With respect to China, Dulles likewise explained that it could not be brought to the negotiating table because "civil war within China and the attitudes of the Allied Governments * * * created a situation such that there [was] not general international agreement upon a single Chinese voice with both the right and the power to bind the Chinese nation to terms of peace." *Id.* at 85.

Hence, although the treaty granted certain rights and benefits to Korea and China, the two countries simply were not signatories to the treaty. According to the plain text of the treaty, therefore, Korea and China do not qualify as "Allied Powers" subject to the waiver provision of Article 14(b). *See* Treaty at 3190. As a result, unlike the claims of the United States and Allied plaintiffs, the Treaty of Peace with Japan cannot be interpreted to waive the claims of the Korean and Chinese plaintiffs.

This circumstance creates a possible paradox that claims of non-Americans arising from forced labor experiences during World War II might be litigated in a court of the United States while the identical claims of American and Allied veterans are barred by the treaty. That possibility lays bare the significant foreign policy questions implicated in these cases and compels the court to address the constitutionality of the statute upon which they are based.

A

Before reaching the constitutional issues presented by these cases, the court must address whether the claims of the Korean and Chinese plaintiffs made under section 354.6 are preempted by the Treaty of Peace with Japan. Although defendants simply suggest this in passing, *see* Def. Br. (Doc. # 210) at 3-4, the United States asserts in its amicus curiae brief that the treaty preempts the claims of all non-Allied plaintiffs, *see* United States SOI (Doc. # 302) at 9-12. The Korean and Chinese plaintiffs do not directly address this argument. Nevertheless, the Supreme Court instructs that federal courts faced with both statutory questions and

constitutional questions should decide the former first in an attempt to avoid unnecessary constitutional inquiries. *See Department of Commerce v. United States House of Representatives*, 525 U.S. 316, 343-44 (1999) (citations omitted); *see also Liberty Warehouse Co. v. Grannis*, 273 U.S. 70 (1927) (applying doctrine to a challenge to a state statute); *Mass. State Grange v. Benton*, 272 U.S. 525 (1926) (same).

As a preliminary matter, the court emphasizes that this inquiry is limited to whether the treaty preempts the claims of non-Allied plaintiffs only. To be sure, section 354.6 purports to provide a cause of action for other individuals as well. Indeed, section 354.6 appears to have been motivated mostly by a desire to give California, as opposed to foreign, "residents and citizens * * * a reasonable opportunity to claim their entitlement to compensation for forced or slave labor performed prior to and during the Second World War." Cal. CCP § 354.6, note § 1(c). But the only cases remaining before the court were brought by nationals of non-signatory nations. Accordingly, the question is not whether the treaty preempts section 354.6 generally, but whether the treaty preempts California's effort to supply a cause of action for non-Allied plaintiffs such as those of Korean and Chinese descent. This order addresses that issue only.

Under Article VI of the Constitution, the laws of the United States are "the supreme Law of the Land; * * * any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. art. VI, cl. 2. A treaty made by the President with the required approval of two-thirds of the Senate is part of the "supreme law of the land," and thus,

similar to federal statutes, valid treaties override any conflicting state law. *Missouri v. Holland*, 252 U.S. 416, 432 (1920); *see also Ware v. Hylton*, 3 U.S. (3 Dall.) 199 (1796). A treaty prevails whether it is ratified before or after the enactment of the conflicting state law. Laurence H Tribe, *American Constitutional Law* § 4-4 at 645 (3d ed. 2000) (hereinafter, Tribe) (citing *Nielsen v. Johnson*, 279 U.S. 47 (1929)).

Although the Supreme Court has written extensively about when congressional acts have preemptive effect, *see, e.g., Crosby v. National Foreign Trade Council*, 530 U.S. 363 (2000); *United States v. Locke*, 529 U.S. 89 (2000), it has provided little guidance on the preemptive effect of treaties. For acts of Congress, the Court provides that such legislation preempts state law when (1) Congress expressly provided for preemption, (2) Congress intended to "occupy the field," or (3) the state law conflicts with the congressional statute at issue. *Crosby*, 530 U.S. at 372; *see also English v. General Elec. Co.*, 496 U.S. 72, 79 n.5 (1990) (recognizing that these categories are not "rigidly distinct"). The Court has not established a similar detailed framework for courts to utilize when analyzing preemption by treaties. *See, e.g., United States v. Belmont*, 301 U.S. 324, 331 (1937) (noting, without any analysis, that treaties trump conflicting state laws). The Court has stated, however, that this preemption framework should not be applied "mechanically" when construing whether a treaty or international agreement preempts a state law because "the nation-state, not subdivisions within one nation, is the focus of the [treaty] and the perspective of our treaty partners." *See El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng*, 525 U.S. 155, 175 (1999). In order to determine whether a treaty trumps state law,

therefore, the court should assess the language of the treaty and "give the specific words of the treaty a meaning consistent with the shared expectations of the contracting parties." *Id.* at 167 (quoting *Air France v. Saks*, 470 U.S. 392, 399 (1985)). The court must "be governed by the text—solemnly adopted by the governments of many separate nations—whatever conclusions might be drawn from the intricate drafting history that [exists]." *Chan v. Korean Air Lines, Ltd.*, 490 U.S. 122, 134 (1989).

With these principles in mind, the court looks first to Article 14(b) for an expression of the treaty's intent. As previously noted, this provision bars the claims of signatory nations and their nationals arising out of Japan's actions in the Second World War. *See In re World War II*, 114 F. Supp. 2d. at 944-45. To be sure, the signatory nations desired complete termination of all claims against Japan, but Article 14(b) has no effect on the claims of nationals from non-signatory nations. Hence, although from a perspective of 2001 it may seem anomalous for the United States to negotiate a treaty that bars the claims of its own nationals without a provision that forecloses resort to a judicial forum in the United States by nationals of non-signatory nations, Article 14(b) contains no express limitation against claims of non-signatory nationals. Little should be read into this omission, which most likely can be explained by the inconceivability a half century ago of such claims by non-signatory nationals being pursued in United States courts.

Appendix B

Other relevant provisions of the treaty suggest that the treaty does not address claims of non-signatory nationals. Specifically, article 4(a), which addressed Japan's post-war relationship with Korea, provides:

> The disposition of property of Japan and of its nationals * * * and their claims, including debts, against [Korea], and the disposition in Japan of property of [Korean] authorities and residents, and of claims, including debts, of [Korean] authorities and residents against Japan and its nationals, shall be the subject of special arrangements between Japan and such authorities.

Treaty at 3173. Similarly, with respect to China, article 26 provides:

> Japan will be prepared to conclude with any State * * * which is not a signatory of the present Treaty, a bilateral Treaty of Peace on the same or substantially the same terms as are provided for in the present Treaty * * *.

Id. at 3190. These provisions suggest that the treaty contemplates resolution of war claims with Korea and China through agreements separate and distinct from the Treaty of Peace with Japan and separate agreements necessarily create the possibility that the terms for resolving those claims may differ from the terms of the treaty entered into by the Allied nations. The fact that the signatory nations encouraged such agreements does not show an intent to occupy the field of non-signatory nations' claims through the treaty. *See, e.g.*,

Appendix B

Trojan Technologies, Inc. v. Com. of Penn., 916 F.2d 903, 906-07 (3d Cir. 1990) (refusing to find that an international free trade agreement preempted a state buy-American statute, in part, because the language in the agreement was "hortatory rather than mandatory"). Whether the agreements subsequently entered by Japan with Korea and China eliminated the claims of these non-signatory nations does not bear on whether the Treaty of Peace with Japan preempts claims of Chinese and Korean nationals. The court reads the language of articles 4(a) and 26 to suggest only that the signatory nations, including the federal government of the United States, did not intend the Treaty of Peace with Japan to control claims of individuals from non-signatory nations.

To the extent section 354.6 provides a cause of action to such individuals, therefore, it does not conflict with the expressed intent of the treaty. Accordingly, the treaty itself does not trump the California law in this respect.

B

Simply because the claims of the Korean and Chinese plaintiffs derived from section 354.6 are not preempted by the Treaty of Peace with Japan does not mean that they can go forward, however. Providing a cause of action for these individuals triggers significant constitutional questions. Section 354.6 is unconstitutional because it infringes on the exclusive foreign affairs power of the United States.

Relative to many of the federal government's powers, the contours of the foreign affairs power has been infrequently analyzed and even less frequently clarified. Nevertheless, the

national government's exclusive authority to regulate the foreign affairs of the United States has long been recognized as a constitutional principle of broad scope. *See United States v. Pink*, 315 U.S. 203, 233 (1942) ("Power over external affairs is not shared by the States; it is vested in the national government exclusively."); *Hines v. Davidowitz*, 312 U.S. 52, 63 (1941); *Belmont*, 301 U.S. at 331; *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 318 (1936). "It follows that all state action, whether or not consistent with current foreign policy, that distorts the allocation of responsibility to the national government for the conduct of American diplomacy is void as an unconstitutional infringement on an exclusively federal sphere of responsibility." Tribe, § 4-5 at 656.

This principle, which prohibits state action that unduly interferes with the federal government's authority over foreign affairs derives from both the text and structure of the Constitution. The Constitution allocates power for external affairs to the legislative and executive branches of the national government and simultaneously prohibits the states from engaging in activities that might interfere with the national government's exercise of these powers. To be sure, there is no clause in the Constitution that explicitly grants a "foreign affairs power" to the federal government. *See* L. Henkin, *Foreign Affairs and the United States Constitution* 14-15 (2d ed. 1996) (hereinafter, Henkin). But a number of provisions, when read together, strongly imply that such authority was intended. *See* Harold G. Maier, *Preemption of State Law: A Recommended Analysis*, 83 Am. J. Int'l. L. 832, 832 (1989) (hereinafter, Maier) ("[N]either the Articles of Confederation nor the Constitution provided

for a general foreign affairs power. Nonetheless, there was never any real question that the United States would act as a single nation in the world community.").

Specifically, the Constitution provides that Congress possesses the authority "[t]o lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States," U.S. Const. art. I, § 8, cl. 1, "[t]o regulate Commerce with foreign Nations," *id.*, cl. 3, and "[t]o define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations," *id.*, cl. 10. In addition, while Congress is granted the power "[t]o declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water," *id.*, cl. 11, the President is designated the "Commander in Chief of the Army and Navy of the United States," *id.*, art. II, § 2, cl. 1. The President also is given the authority to "make Treaties" and "appoint Ambassadors" with the "Advice and Consent of the Senate," *id.*, cl. 2, and to "receive Ambassadors and other public Ministers," *id.*, § 3.

With respect to the states, the Constitution directs that "[n]o State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal" or, without the consent of Congress, "lay any Imposts or Duties on Imports or Exports" or "enter into any Agreement or Compact * * * with a foreign Power," or "engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay." *Id.*, § 1, cl. 10.

These and other constitutional provisions evidence an intent on the part of the framers to grant paramount authority for foreign affairs to the political branches of the federal government, thereby necessitating the exclusion of intrusive efforts on the part of the states in foreign relations. The Federalist Papers bolster this interpretation. *See Hines*, 312 U.S. at 64 n.9 ("The importance of the national power in all matters relating to foreign affairs and the inherent danger of state action in this field are clearly developed in [the] Federalist papers * * *."). For example, James Madison wrote: "This class of powers forms an obvious and essential branch of the federal administration. If we are to be one nation in any respect, it clearly ought to be in respect to other nations." The Federalist No. 42, at 264 (C. Rossiter ed. 1961). Similarly, Alexander Hamilton argued, albeit with respect to the related but explicit foreign commerce power of the national government, that

> [t]he interfering and unneighborly regulations of some States, contrary to the true spirit of the Union, have, in different instances, given just cause of umbrage and complaint to others, and it is to be feared that examples of this nature, if not restrained by a national control, would be multiplied and extended till they became not less serious sources of animosity and discord than injurious impediments to the intercourse between the different parts of the Confederacy.

The Federalist No. 22, at 144-45 (C. Rossiter ed. 1961). And as noted in *Hines*, "Thomas Jefferson, who was not generally favorable to broad federal powers, expressed a similar view

in 1787: 'My own general idea was, that the States should severally preserve their sovereignty in whatever concerns themselves alone, and that whatever may concern another State, or any foreign nation, should be made a part of the federal sovereignty.' " *Hines*, 312 U.S. at 64 n.11 (quoting *Memoir, Correspondence and Miscellanies from the Papers of Thomas Jefferson* (1829), vol. 2, p. 230, letter to Mr. Wythe).

The Supreme Court has long acknowledged the federal government's broad authority over foreign affairs. In 1937, for example, Justice Sutherland noted that "complete power over international affairs is in the national government and is not and cannot be subject to any curtailment or interference on the part of the several states." *Belmont*, 301 U.S. at 331. Similarly, Justice Black observed a few years later that "[o]ur system of government is such that the interest of the cities, counties and states, no less than the interest of the people of the whole nation, imperatively requires that federal power in the field affecting foreign relations be left entirely free from local interference." *Hines*, 312 U.S. at 63. To be certain, the holdings of these and other decisions from the same time period were predominantly based on the supremacy of federal law; the Court determined that the state legislation at issue in these cases was preempted by existing federal law or international agreements. But the early observations contained in these cases regarding the national government's broad authority over foreign affairs are instructive because they describe the principles upon which the Supreme Court later relied in *Zschernig v. Miller*, 389 U.S. 429 (1968), to announce the foreign affairs doctrine that governs the case at bar.

Appendix B

In *Zschernig*, the Supreme Court observed that the Constitution entrusts "the field of foreign affairs * * * to the President and the Congress." *Id.* at 432 (citing *Hines*, 312 U.S. at 63). The Court concluded that, as a result, the Constitution itself excludes state intrusion on the federal government's authority over foreign affairs even when the federal branches have not acted. *Id.* at 432, 441; *see also* Henkin at 164. Pointing to the broad principle articulated in *Hines*, the Court stated that "even in the absence of a treaty [or other federal law], a State's policy may disturb foreign relations. * * * If there are to be such restraints, they must be provided by the Federal Government." *Zschernig*, 389 U.S. at 441. In short, the Court concluded that state statutes "must give way if they impair the effective exercise of the Nation's foreign policy." *Id.* at 440.

Zschernig involved an Oregon probate statute that conditioned the inheritance rights of an alien not residing in the United States on his ability to prove that American heirs would have a reciprocal right to inherit estates in the foreign country and that he would receive payments from the Oregon estate "without confiscation, in whole or in part, by the governments of such foreign countries." *Id.* at 430. The Supreme Court noted that it had earlier refused to invalidate a similar statute enacted by California "on its face" because that statute "would have only 'some incidental or indirect effect in foreign countries.' " *Id.* at 432-33 (quoting *Clark v. Allen*, 331 U.S. 503, 517 (1947)). In *Zschernig*, however, the Court assessed "the manner of [the Oregon statute's] application" and observed that the law had compelled state courts to "launch[ ] inquiries into the type of governments that obtain in particular foreign nations." *Id.* at 434. The Court

noted, for example, that the statute triggered assessments of "the actual administration of foreign law" and "the credibility of foreign diplomatic statements." *Id.* at 435. In short, the statute "seem[ed] to make unavoidable judicial criticism of nations established on a more authoritarian basis than our own." *Id.* at 440. Looking at these effects of the Oregon statute, the Court concluded that it was unconstitutional because it "affect[ed] international relations in a persistent and subtle way," had a "great potential for disruption or embarrassment" and triggered "more than 'some incidental or indirect effect in foreign countries.' " *Id.* at 434-35, 440.

Zschernig thus stands for the proposition that states may legislate with respect to traditional state concerns, such as inheritance and property rights, even if the legislation has international implications, but such conduct is unconstitutional when it has more than an "incidental or indirect effect in foreign countries." *Id.* at 440. As the First Circuit recently stated, under *Zschernig* "there is a threshold level of involvement in and impact on foreign affairs which the states may not exceed." *National Foreign Trade Council v. Natsios*, 181 F.3d 38, 49-57 (1st Cir. 1999), aff'd on other grounds sub nom, *Crosby v. National Foreign Trade Council*, 530 U.S. 363 (2000). Or, as the Third Circuit has summarized the doctrine, if a state law were to "involve[ ] the state in the actual conduct of foreign affairs[, the statute] is unconstitutional." *Trojan*, 916 F.2d at 913 (citing *Pink*, 315 U.S. 203).

This doctrine makes sense because the nation as a whole is affected when state-driven foreign policy has an impact on other countries. *See* Lori A. Martin, *The Legality of*

Nuclear Free Zones, 55 U. Chi. L. Rev. 965, 993 (1988). Indeed, for that very reason states have inadequate incentive to consider the effects of their actions on foreign relations. *See id. Zschernig* thus enables the courts to ensure that the states have not overstepped the line at the risk of endangering the nation as a whole.

Before evaluating section 354.6 in this regard, the court rejects the Korean and Chinese plaintiffs' suggestion that *Zschernig* is no longer valid. To be sure, some commentators have suggested that the reach of the Court's holding in *Zschernig* should be limited. *See, e.g.*, Henkin at 165 n.* *; Curtis A Bradley & Jack L. Goldsmith, *Customary International Law: A Critique of the Modern Position*, 110 Harv. L. Rev. 815, 865 (1997); Jack L. Goldsmith, *Federal Courts, Foreign Affairs, and Federalism*, 83 Va. L. Rev. 1617, 1698-1706 (1997); Peter J Spiro, *The States and Immigration in an Era of Demi-Sovereignties*, 35 Va. J. Int'l. L. 121, 161-74 (1994); but *see* Tribe § 4-5 at 656-57; Maier at 832-33. But *Zschernig* has not been overruled, and thus the constitutional principles it enunciates remain the law. *See Natsios*, 181 F.3d at 59 ("[T]here is simply no indication, in * * * any * * * post-*Zschernig* case, that *Zschernig* is not good law and is not binding on us."). California and all states enacting legislation touching upon foreign affairs are thus bound by the doctrines of *Zschernig* until the Supreme Court instructs otherwise. As the Ninth Circuit has noted on numerous occasions, "speculation" about the continuing vitality of Supreme Court precedent "does not permit us to ignore [such] controlling * * * authority." *United States v. Pacheco-Zepeda*, 234 F.3d 411, 414 (9th Cir. 2001) (citing *Agostini v. Felton*, 521 U.S. 203, 237 (1997) (directing

that lower courts should leave to the Supreme Court "the prerogative of overruling its own decisions") (citation omitted)); *see also Montana Chamber of Commerce v. Argenbright*, 226 F.3d 1049, 1057 (9th Cir. 2000) (citing *Agostini* and noting same); *Duffield v. Robertson Stephens & Co.*, 144 F.3d 1182, 1192 (9th Cir. 1998) (same).

Indeed, on two recent occasions the Ninth Circuit has recognized the continuing vitality of *Zschernig*. *See Gerling Global Reinsurance Corp. of America v. Low*, 240 F.3d 739, 751-53 (9th Cir. 2001); *Int'l Assoc. of Indep. Tanker Owners v. Locke*, 148 F.3d 1053, 1068 (9th Cir. 1998), rev'd on other grounds sub nom *United States v. Locke*, 529 U.S. 89 (2000). In *Tanker Owners*, the Ninth Circuit rejected an argument that oil regulations promulgated by the state of Washington were unconstitutional under *Zschernig* because the litigant "failed to demonstrate that, even if those regulations [had] some extraterritorial impact, that impact [was] more than 'incidental or indirect.' " *Tanker Owners*, 148 F.3d at 1069 (quoting *Zschernig*, 389 U.S. at 434). The decision affirms, therefore, that when a litigant makes a showing that the statute at issue triggers "more than 'some incidental or indirect effect in foreign countries,' " the statute is unconstitutional as an intrusion on the federal government's foreign affairs power. *See id.* (quoting *Zschernig*, 389 U.S. at 434).

Similarly, in *Gerling*, although the Ninth Circuit declined to apply *Zschernig* to California's Holocaust Victim Insurance Relief Act of 1999 (HVIRA), Cal. Ins. Code §§ 13800-13807, *see Gerling*, 240 F.3d at 753, the court did not suggest that *Zschernig* is no longer valid. Rather, the court concluded that the HVIRA did not trigger the concerns implicated by

the statutes in *Zschernig* and cases applying its doctrine. *See id.* The court stated that it "hesitate[d] to apply *Zschernig* to a facial challenge to state statutes involving 'foreign affairs' (a) but that mainly involve[d] foreign commerce and (b) that [were] not directed at a particular country." *Id.* The court also suggested that it was hesitant to apply *Zschernig* because "there is no evidence that HVIRA would implicate the diplomatic concerns mentioned in *Zschernig*." *Id.* By implication, therefore, the Ninth Circuit would apply *Zschernig* to state statutes that do not regulate commerce, are directed at a particular country or implicate the diplomatic concerns present in *Zschernig*.

In addition, other courts have applied the principles of *Zschernig* to strike down state or local laws. *See, e.g.*, *Natsios*, 181 F.3d 38, 49-61 (finding that the Massachusetts Burma Law, which restricted the ability of Massachusetts and its agencies from purchasing goods or services from companies that did business with Burma (Myanmar), was unconstitutional, in part, as a "threat to [the] federal foreign affairs power"); *Tayyari v. New Mexico State University*, 495 F. Supp. 1365, 1376-79 (D. N.M. 1980) (striking down a University's policy designed to "rid the campus of Iranian students" because it conflicted with a federal regulation and "frustrate[d] the exercise of the federal government's authority to conduct the foreign relations of the United States"); *Springfield Rare Coin Galleries v. Johnson*, 503 N.E.2d 300, 305-07 (Ill. 1986) (invalidating an Illinois statute that excluded South Africa from a tax exemption as more than an "incidental" intrusion on the federal government's foreign affairs power); *New York Times Co. v. City of New York Commission on Human Rights*, 361 N.E.2d

963, 969 (N.Y. 1977) (striking down a New York City antidiscrimination statute because it "interfere[d] with the foreign policy authority of the Federal Government"); *Bethlehem Steel Corp. v. Board of Commissioners*, 276 Cal. App. 2d 221, 227-29, 80 Cal. Rptr. 800 (1969) (invalidating a California Buy American statute because it had "more than 'some incidental effect in foreign countries' and * * * great potential for disruption * * *.").

The infrequency with which *Zschernig* has been applied over the years does not suggest a weakening in the doctrine. To the contrary, it shows that the federal government has affirmatively enacted legislation or international agreements in most areas of foreign relations that expressly preempt conflicting state and local legislation under the Constitution's Supremacy clause, thereby obviating the need for analysis under *Zschernig*. *See, e.g.*, *Crosby*, 530 U.S. 363 (affirming invalidity of the Massachusetts Burma law on preemption grounds). It also suggests that, despite several high profile examples of international involvement, state and local authorities tend to focus on state and local issues. *See* Howard N. Fenton III, *The Fallacy of Federalism in Foreign Affairs: State and Local Foreign Policy Trade Restrictions*, 13 Nw. J. Int'l. L. & Bus. 563, 564 (1993). Indeed, most actions by states and municipalities that directly address foreign policy issues do not raise the type of diplomatic concerns expressed by the Court in *Zschernig*. For example, local authorities seeking to make international statements often enact non-binding resolutions or form sister-city relationships with foreign communities. *See id.* Section 354.6 represents a much greater foray into the field of foreign affairs.

Turning to an analysis of section 354.6, the court reiterates that under *Zschernig*, California may legislate with respect to local concerns that touch upon foreign affairs, but only if its actions have just "some incidental or indirect effect in foreign countries." *Zschernig*, 389 U.S. at 433 (quoting *Clark*, 331 U.S. at 517). The court concludes that section 354.6, as applied to defendants here, clearly crosses this "forbidden line." *See Clark*, 331 U.S. at 517.

The court's conclusion is mandated by the following observations: (1) the terms of section 354.6 and its legislative history demonstrate a purpose to influence foreign affairs directly, (2) the statute targets particular countries, (3) the statute does not regulate an area that Congress has expressly delegated to states to regulate, (4) the statute establishes a judicial forum for negative commentary about the Japanese government and Japanese companies, (5) the Japanese government asserts that litigation of these claims could complicate and impede diplomatic relationships of the countries involved, and (6) the United States, through the State Department, contends that section 354.6 impermissibly intrudes upon the foreign affairs power of the federal government.

First, the language of section 354.6 and the contemporaneous comments of its creators demonstrate that the statute embraces a foreign policy purpose, namely, to provide a mechanism for individuals to obtain war-related reparations. By its terms, the statute purports to enable individuals from any country forced to labor during World War II by the Japanese government or Japanese companies "to recover compensation" for such labor. *See* Cal. CCP § 354.6(b).

Moreover, as the notes to the statute indicate, the legislature determined that the "victims of Nazi [and Japanese] persecution have been deprived of their entitlement to compensation [earned] during the Second World War." *Id.*, note § 1(b). Indeed, Governor Gray Davis stated shortly after signing the bill that the law would "help right a historic wrong which occurred over 50 years ago during World War II when men, women and children were forced into slave labor." *See* Henry Weinstein, *Bill Signed Bolstering Holocaust-Era Claims*, LA Times, July 29, 1999, at A3. The author of the measure, Senator Tom Hayden, similarly asserted at the time:

> [Section 354.6] sends a very powerful message from California to the U.S. government and the German government, who are in the midst of rather closed negotiations about a settlement. * * * If the international negotiators want to avoid very expensive litigation by survivors as well as very bad public relations for companies like Volkswagen and Ford, they ought to settle. * * * Otherwise, this law allows us to go ahead and take them to court.

Id. Since the statute purports to create a cause of action for compensation from companies related to "the Nazi regime, its allies or sympathizers," it cannot be doubted that the same message is intended for the Japanese government and Japanese corporations.

These issues and determinations which underlie section 354.6 are thus identical to the "uniquely federal" reparations concerns that were addressed by the United States while

negotiating the Treaty of Peace with Japan. *See In re World War II*, 114 F. Supp. 2d at 946; *see also Ware*, 3 U.S. (3 Dall.) at 199, 230 (establishing that the war-related claims of individual citizens can only be brought by their government); *Burger-Fischer v. Degussa AG*, 65 F. Supp. 2d 248, 273-74 (D. N.J. 1999) (noting same). By establishing California courts as an avenue for reparations, therefore, section 354.6 engages California in the uniquely federal foreign policy function of addressing claims for reparations that arise in the aftermath of a war.

Second, section 354.6 targets particular countries by allowing a cause of action against companies that transacted business in any of the areas occupied by "the Nazi regime, its allies or sympathizers." *See* Cal. CCP § 354.6. Because the statute singles out such a narrow set of countries—most notably, Germany and Japan—it suggests that California intended the statute to send an explicit foreign relations message, rather than simply to address some local concern.

As a contrast, in *Trojan* the Third Circuit upheld a Pennsylvania "Buy American" law, in part, because "the statute applie[d] to steel from *any* foreign source, without respect to whether the country might be considered friend or foe." *Trojan*, 916 F.2d at 913 (emphasis added). By not singling out a particular country or set of countries, the Pennsylvania statute implicitly focused on a local concern (the local steel industry), as opposed to engaging in international relations directly with a particular country or set of countries.

Appendix B

The Korean and Chinese plaintiffs point out that the Ninth Circuit referred to this characteristic of the law in *Trojan* when assessing the applicability of *Zschernig* to the HVIRA, implying that this court should do the same with respect to section 354.6. *Gerling*, 240 F.3d at 752-53. As discussed, the *Gerling* court was hesitant to apply *Zschernig*, in part, because the HVIRA was not directed at a particular country. *Id.* at 753. But, in this regard, section 354.6 is significantly different from the HVIRA. While section 354.6 is aimed at a few specific countries, the HVIRA applied to insurers from any country. *See* Cal. Ins. Code § 13804(a) ("*Any* insurer * * * that sold * * * insurance policies * * * to persons in Europe, which were in effect between 1920 and 1945 [must file certain information with the insurance commissioner]."") (emphasis added). Thus, the *Gerling* court's reliance on this observation in *Trojan* to minimize the foreign affairs effect of the HVIRA suggests the opposite conclusion for section 354.6.

With respect to this point, therefore, section 354.6 is closer to the statute struck down by the Supreme Court in *Zschernig*. The Oregon statute at issue was generally applied only against residents of a narrow set of countries (those "established on a more authoritarian basis than our own"); section 354.6 similarly applies only against companies of a narrow set of countries. Indeed, section 354.6 targets an even smaller set of countries than the law at issue in *Zschernig*. The California law's focus on a few particular countries, therefore, further evidences an intrusion by the state on the field of foreign affairs.

Third, section 354.6 does not regulate an area that Congress has expressly delegated to the states. In fact, by establishing a mechanism for forced labor victims to obtain war reparations, the statute relates to a subject that has always been addressed at the federal level. To the contrary, the HVIRA regulates insurance companies, which, as the *Gerling* court noted, has been deemed by the Supreme Court to be "a local matter." *Gerling*, 240 F.3d at 744 (citing *FTC v. Travelers Health Ass'n*, 362 U.S. 293, 302 (1960)). At bottom, therefore, the "HVIRA is a California insurance regulation of California insurance companies * * *." *Id.* at 746. The Ninth Circuit's hesitancy to apply *Zschernig* to a constitutional challenge of the HVIRA because the law regulated an area of commerce for which Congress had expressly delegated the regulatory power to the states is thus irrelevant to the court's analysis here. Accordingly, section 354.6 cannot be validated as a regulation of a local concern in the same manner as the HVIRA. The Korean and Chinese plaintiffs do not contend otherwise.

Fourth, because section 354.6 opens the door to lawsuits about the conduct of the Japanese government and Japanese companies during the Second World War, the primary dangers of the Oregon statute that concerned the Court in *Zschernig* are likewise triggered here. Specifically, such litigation cannot be carried to fruition without making "unavoidable judicial criticism" of the efforts of Japan and its war industry. *See Zschernig*, 389 U.S. at 440. To be sure, the commentary would by necessity focus on the past, but, particularly given the fact that it would emanate from the official forum of American courts, Japan's current regime could not avoid being negatively implicated by association. It seems beyond

doubt, therefore, that the statute has the potential to have an impact on foreign relations between the United States and Japan "in a persistent and subtle way." *See id.*

Fifth, and related to the court's fourth observation, the Japanese government has made clear that it is concerned about the effects of section 354.6 on Japan's relationship with the United States. *See* Views of the Government of Japan, United States SOI (Doc. # 302), Exh. 1. In a submission to this court by the Embassy of Japan, the Japanese government points out that the claims of the Korean and Chinese plaintiffs have already been settled or are in the process of being settled through diplomatic negotiations between Japan, China, and North and South Korea. *See id.* at 5. California's efforts to provide an alternative forum for these claims interferes with Japan's diplomatic efforts and credibility in this regard. As Japan states:

> Permitting plaintiff's claims will put the courts in the United States in an unwarranted place to inevitably affect relations between the countries concerned, including the bilateral settlement reached after highly political and sensitive negotiations. Such involvement of the courts in the United States could complicate and impede relationships between Japan and those countries as well as the bilateral relationship between the United States and Japan. The Government of Japan is convinced that these issues should not be adjudicated in the courts in the United States.

Id. To be sure, the court recognizes that Japan has a financial interest in repressing any demands for further compensation against its nationals arising out of the war. But Japan's submission nevertheless serves as a reminder that the United States also has its own interest in maintaining normal diplomatic relations with Japan. The protests of the Japanese government thus demonstrate that section 354.6 has "great potential for [causing] disruption or embarrassment" here in the United States. *See Zschernig*, 389 U.S. at 435.

Finally, the federal government, as represented by the State Department, agrees with defendants that section 354.6 impermissibly intrudes on the foreign affairs power of the federal government. *See* United States SOI (Doc. # 302) at 12-16. The State Department represents one of the two political branches with the exclusive authority to handle the country's foreign affairs, and thus it is in a good position (and certainly better position than this court) to determine if that power has been intruded upon. In this regard, the government asserts:

> By enacting the statute, California has created its own policy in a particular area of foreign relations—one which judges the activities of foreign governments and corporations during * * * World War II, and the treaties and agreements Japan and other nationals made in the wake of the war. If each state were free to impose burdens that diverge from the foreign policy interests of the nation as a whole as expressed by the President and to have its own foreign policy, it would * * * significantly diminish the

Appendix B

> President's "economic and diplomatic leverage" and, hence, his authority to negotiate agreements with foreign governments.

Id. at 16 (citation omitted). The court finds it notable that the Supreme Court concluded that application of the law at issue in *Zschernig* was unconstitutional even though the federal government had submitted an amicus curiae brief in which it stated that "[t]he government does not * * * contend that the application of the * * * statute in the circumstances of this case unduly interferes with the United States' conduct of foreign relations." *Zschernig*, 489 U.S. at 434-35. Section 354.6, to the contrary, has triggered the opposite reaction from the federal government. Accordingly, the concerns of the State Department further persuade the court to conclude that an application of section 354.6 to defendants here cannot pass constitutional muster.

The few arguments of the Korean and Chinese plaintiffs in opposition to this conclusion are unpersuasive.

First, the Korean and Chinese plaintiffs make much of the distinction between facial and as applied challenges to the constitutionality of a statute. Specifically, they argue that *Zschernig*, which the Court framed as an as-applied analysis, cannot govern the present inquiry because defendants have challenged the validity of section 354.6 on its face. *See* Pl. Supp. Br. (Doc. # 323) at 6-7. But the Korean and Chinese plaintiffs are simply incorrect; defendants, in fact, challenge section 354.6 as it applies to them. *See* Def. Supp. Br. (Doc. # 336) at 1. As the Court established long ago, the proper method for adjudicating the constitutionality of

a statute is for the affected parties to challenge the statute at issue as applied to them. *See United States v. Raines*, 362 U.S. 17, 20-21 (1960). In *Raines*, the Court made clear that "[t]he very foundation of the power of the federal courts to declare Acts of Congress unconstitutional lies in the power and duty of those courts to decide cases and controversies properly before them." *Id.*; *see also United States v. Kurt*, 988 F.2d 73, 76 (9th Cir. 1993) ("A defendant cannot claim a statute is unconstitutional in some of its reaches if the statute is constitutional as applied to him.") (citing *Raines*, 362 U.S. at 21-22); Richard H. Fallon, Jr., *As-Applied and Facial Challenges and Third-Party Standing*, 113 Harv. L. Rev. 1321, 1324 (2000) (concluding that "there is no single distinctive category of facial, as opposed to as-applied, litigation. Rather, all challenges to statutes arise when a particular litigant claims that a particular statute cannot be applied against her.").

To be sure, both the Supreme Court and the Ninth Circuit have cited this distinction as a factor influencing their analyses under the foreign affairs doctrine. *See Zschernig*, 389 U.S. at 433 (distinguishing *Clark*, in which the Court had refused to strike down a similar California statute, as addressing a challenge to the statute on its face); *Gerling*, 240 F.3d at 752 (noting that the HVIRA was challenged on its face). But given the posture of the challenge to section 354.6 brought by defendants, the court is not persuaded by the efforts of the Korean and Chinese plaintiffs to cloud the analysis here.

The Korean and Chinese plaintiffs also contend that because defendants are businesses, as opposed to foreign governments, section 354.6 does not implicate *Zschernig's*

foreign affairs doctrine. *See* Pl. Supp. Br. (Doc. # 323) at 8. But such a contention does square with their complaints, in which the Korean and Chinese plaintiffs emphasize that the conduct of the Japanese companies during the war was condoned and controlled by the Japanese government. *See, e.g., Sung* Compl., ¶ 10 ("The Japanese government set up programs whereby Japanese companies (including defendants) could use civilian internees as slaves or forced laborers."); *Oh* Compl., ¶¶ 65, 67 ("In August 1936, Japanese Army General Minami Jiro was appointed Governor-General of Korea. Under his control private Japanese companies, including the Defendants, expanded those industries in Korea critical to Japan's war-making ability. * * * Japan enacted laws applicable to Korea forcing Koreans to labor in certain industries."). The Japanese government, as opposed to just these private defendants, is clearly implicated by the claims asserted under section 354.6 by the Korean and Chinese plaintiffs.

Even if these cases could somehow be characterized as claims between private parties, *Zschernig* clearly instructs that an application of state legislation that has more than "some incidental or indirect effect *in foreign countries*" is invalid. *See Zschernig*, 389 U.S. at 434 (emphasis added). Whether section 354.6 is applied to businesses or the Japanese government, the statute certainly has an effect in Japan.

Finally, the Korean and Chinese plaintiffs also suggest that since Congress has not addressed the subject matter here—forced labor compensation claims against Japanese companies—then there is no federal policy or legislation

with which section 354.6 may conflict. *See* Pl. Supp. Br. (Doc. # 323) at 8. To be sure, this argument would be relevant if the court were analyzing whether section 354.6 violated the federal government's foreign commerce authority. *See Gerling*, 240 F.3d at 743-51. As already discussed, however, the foreign affairs doctrine prohibits state and local intrusion into the field of foreign relations regardless whether a conflicting federal law or policy exists. *See* Tribe, § 4-5 at 656 ("[A]ll state action, whether or not consistent with current federal foreign policy, that distorts the allocation of responsibility to the national government for the conduct of American diplomacy is void * * *."). It is the intrusion itself, which *could* inhibit the federal government's ability to "deal with those problems," that makes the application of such legislation unconstitutional. *See Zschernig*, 389 U.S. at 441. The federal government's actual policy, therefore, is irrelevant to the court's analysis.

Based on the foregoing observations, the court concludes that applying section 354.6 to defendants will "affect[ ] international relations in a persistent and subtle way," have a "great potential for disruption or embarrassment" in the United States and trigger "more than some incidental or indirect effect" in Japan. *See Zschernig* at 434-35, 440. As a result, California's attempt to provide a cause of action to the Korean and Chinese plaintiffs against defendants is an unconstitutional intrusion on the exclusive foreign affairs power of the federal government.

Appendix B

III

In light of the court's conclusion that the application of section 354.6 to defendants is unconstitutional, the Korean and Chinese plaintiffs may not rely on the California statute to pursue their claims against defendants. The Korean and Chinese plaintiffs contend, however, that they allege claims that arise under other statutes as well, namely the Alien Tort Claims Act (ATCA), 28 U.S.C. § 1350, and various California laws. The court addresses these claims now.

A

The court turns first to the Korean and Chinese plaintiffs' purported claims under the ATCA. Although no reference is made to the ATCA in any of the seven complaints, the Korean and Chinese plaintiffs place extensive reliance on the statute and the few decisions interpreting it to oppose defendants' motions to dismiss.

The ATCA, originally enacted by the 1st Congress in the Judiciary Act of 1789, provides that

> [t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.

28 U.S.C. § 1350. In the Ninth Circuit, section 1350 provides both federal jurisdiction and a substantive right of action for certain violations of customary international law. *In re Estate of Ferdinand Marcos, Human Rights Litigation*, 25 F.3d

1467, 1474-76 (9th Cir. 1994) (*Marcos II*); *see also Alvarez-Machain v. United States*, 107 F.3d 696, 703 (9th Cir. 1997). In order to state a claim under the ATCA, a plaintiff must allege (1) a claim by an alien, (2) asserting a tort (3) committed in violation of the law of nations (i.e., international law). *See Doe v. Unocal Corp.*, 110 F. Supp. 2d 1294, 1303 (C.D. Cal. 2000). To be actionable under section 1350, an alleged violation must be of an international norm that is "specific, universal and obligatory." *See Marcos II*, 25 F.3d at 1475 (citing *Filartiga v. Pena-Irala*, 630 F.2d 876, 881 (2d Cir. 1980); *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 781 (D.C. Cir. 1984)).

Defendants do not challenge that the elements for a claim under section 1350 have been satisfied here. With respect to the first two elements, most of the Korean and Chinese plaintiffs reside outside of the United States and the type of actions that defendants are alleged to have committed during the Second World War inflicted personal injuries that sound in tort. Regarding the third element, two of the seven complaints allege that the defendants forced the plaintiffs to labor without compensation in violation of their rights under international law. *See Kim* Compl., ¶¶ 76-79, 81; *Choe* Compl., ¶ 81.

Whether requiring individuals to engage in forced and slave labor meets the "specific, universal and obligatory standard" required to violate the law of nations has not been specifically addressed by the Ninth Circuit. Cf. *Marcos II*, 25 F.3d at 1475 (finding that official torture violates the law of nations). To be sure, the Ninth Circuit has noted in passing that slavery violates a *jus cogens* norm. *United States v.*

Matta-Ballesteros, 71 F.3d 754, 764 n.5 (9th Cir. 1995) (citing *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 714-15 (9th Cir. 1992)). Such norms are "nonderogable and peremptory, enjoy the highest status within customary international law, are binding on all nations, and can not be preempted by treaty." *Id.* (citation omitted). It remains unclear, however, whether all *jus cogens* norms meet the "specific, universal and obligatory standard" required to be actionable under section 1350.

Courts faced with making this determination may be guided by judicial decisions enforcing the law of nations, the work of jurists and the general usage and practice of nations. *Martinez v. City of Los Angeles*, 141 F.3d 1373, 1383 (9th Cir. 1998) (citing *Siderman*, 965 F.2d at 714-15); *see also United States v. Smith*, 5 Wheat. 153, 18 U.S. 153, 160-61 (1820). In this regard, a district court in New Jersey addressing forced labor claims under the ATCA against Ford Motor Company recently concluded that "[t]he use of unpaid, forced labor during World War II violated clearly established norms of international law." *Iwanowa v. Ford Motor Co.*, 67 F. Supp. 2d 424, 440 (D. N.J. 1999). As that court reasoned, this conclusion is supported by the following: (1) the Nuremberg Tribunals held that enslavement and deportation of civilian populations during the war constituted a crime against humanity in violation of international law, *id.* (citing R. Jackson, *The Nuremberg Case* xiv-xv (1971)); (2) the Nuremberg Principle IV(b) provides that the "deportation to slave labor * * * of civilian populations of or in occupied territory" constitutes both a "war crime" and a "crime against humanity," *id.* (quoting Nuremberg Charter, annexed to the London Agreement on War Criminals,

Aug. 8, 1945, art. 6, 59 Stat. 1544, 82 UNTS 279); and (3) several American and German jurists have stated that conduct related to slave labor violates international law, *id.* at 440-41 (citing *Handel v. Artukovic*, 601 F. Supp. 1421, 1426 n.2 (C.D. Cal. 1985); *Kadic v. Karadzic*, 70 F.3d 232, 239 (2d Cir. 1996); *Princz v. Federal Republic of Germany*, 26 F.3d 1166, 1180 (D.C. Cir. 1994) (Wald, J, dissenting); *Siderman*, 965 F.2d at 715; *Tel-Oren*, 726 F.2d at 781 (Edwards, J, concurring); LG [District Court of Germany] Bremen, 1 O 2889/90 at 7 (1998) (FRG); *Krakauer v. Federal Republic of Germany*, LG [District Court of Germany] Bonn, 1 O 134/92, at 21 (1997) (FRG), rev'd on other grounds, OLG [Court of Appeals] Cologne, 7 U 222/97 (1998) (FRG)).

Given the Ninth Circuit's comment in *Matta-Ballesteros*, 71 F.3d at 764 n.5, that slavery constitutes a violation of *jus cogens*, this court is inclined to agree with the *Iwanowa* court's conclusion that forced labor violates the law of nations. Indeed, it seems beyond doubt that the forced labor practices of defendants during the Second World War violated traditional international law. But such conduct took place over 50 years ago. To the extent the Korean and Chinese plaintiffs have asserted claims under the ATCA for conduct taking place during World War II, the court concludes that the claims must be dismissed because they are time-barred.

Although the ATCA itself does not contain a statute of limitations, when a cause of action under federal civil law does not have a directly applicable limitations period, the Supreme Court has instructed that the court should not assume that no time limit for the cause of action was intended. *DelCostello v. International Bhd. of Teamsters*, 462 U.S. 151,

158 (1983). Instead, the court must "borrow" the most suitable limitations period from some other source, traditionally, the law of the forum state. *Id.*; *see also* Wright & Miller, 19 *Federal Practice and Procedure* § 4519 at 595 (West Publishing Co. 1996). Since "[s]tate legislatures do not devise their limitations periods with national interests in mind, and it is the duty of the federal courts to assure that the importation of state law will not frustrate or interfere with the implementation of national policies," however, the Supreme Court has recognized a narrow exception to the general rule that statutes of limitation are to be borrowed from state law. *Reed v. United Transportation Union*, 488 U.S. 319 (1989) (quoting *Occidental Life Ins. Co. of California v. EEOC*, 432 U.S. 355, 367 (1977)). Specifically, the court should not borrow the state limitations period "when a rule from elsewhere in federal law clearly provides a closer analogy than available state statutes, and when the federal policies at stake and the practicalities of litigation make that rule a significantly more appropriate vehicle for interstitial law-making." *Id.* (quoting *DelCostello*, 462 U.S. at 172).

With these principles in mind, the court must identify the closest analogies to the ATCA from both state and federal law and determine which one presents the best analogy. *Forti v. Suarez-Mason*, 672 F. Supp. 1531, 1547 (N.D. Cal. 1987); *see also Iwanowa*, 67 F. Supp. 2d at 462-63 (citing *Forti*); *Xuncax v. Gramajo*, 886 F. Supp. 162, 190-93 (D. Mass. 1995) (same). The Korean and Chinese plaintiffs have brought their claims under the ATCA in an effort to obtain compensation from defendants for the damages caused by requiring them to engage in forced and slave labor during

the Second World War. This effort closely resembles a personal injury suit, such as for false imprisonment, and thus the most analogous state laws are those providing personal injury causes of action for intentional torts. In California, such tort actions have a one year statute of limitations. *See* Cal. Civil Proc. Code § 340(3).

Locating the closest federal statute is a relatively straightforward task. In 1991, Congress enacted the Torture Victim Protection Act (TVPA) as a statutory note to the ATCA. *See* 28 U.S.C. § 1350, notes. The TVPA provides that any "individual who, under actual or apparent authority, or color of law, of any foreign nation * * * subjects an individual to torture * * * [or] extrajudicial killing shall, in a civil action, be liable for damages * * *." *Id.*, note § 2(a). Given the similarity between forced labor and torture—both of which, as noted above, the Ninth Circuit considers to be violations of *jus cogens* norms—combined with Congress' decision to incorporate the TVPA into the notes of the ATCA, the court concludes that the TVPA serves as the closest federal statute to the ATCA. The TVPA provides a ten year limitations period. 28 U.S.C. § 1350, note § 2(c).

In light of the fact that the TVPA is directed at conduct committed in foreign nations that violates customary international law (torture and extrajudicial killing), much like a cause of action under the ATCA would address, the court concludes that the TVPA is a much better analogy than state law. Indeed, the courts that have evaluated what limitations period should apply under the ATCA since the TVPA was enacted have reached the same conclusion. *See, e.g.*, *Iwanowa*, 67 F. Supp. 2d at 462; *Cabiri v. Assasie-Gyimah*,

921 F. Supp. 1189, 1195-96 (S.D. N.Y. 1996); *Xuncax*, 886 F. Supp. at 192-93. Accordingly, the court concludes that the TVPA's ten year statute of limitations applies to the claims of the Korean and Chinese plaintiffs.

Federal law determines when a cause of action accrues and the statute of limitations begins to run. *TwoRivers v. Lewis*, 174 F.3d 987, 991 (9th Cir. 1999). Under federal law, a plaintiff's cause of action accrues "when the plaintiff knows or has reason to know of the injury which is the basis of the action." *Id.* Under this standard, the Korean and Chinese plaintiffs were aware of their injuries no later than when the war ended in 1945. These cases were initiated, however, in 1999 and 2000, over 50 years later and well outside the ten year limitations period.

Intertwined in the analysis of the timeliness of an action, of course, is whether the applicable statute of limitations has been tolled. When borrowing the limitations period from another federal statute, federal, rather than state, tolling doctrines apply. *See Emrich v. Touche Ross & Co.*, 846 F.2d 1190, 1199 (9th Cir. 1988) (citing *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 466 (1975)); *see also* Wright & Miller, 19 *Federal Practice and Procedure* § 4519 at 627-33 (West Publishing Co. 1996). As the Ninth Circuit has pointed out, the Senate Report on the TVPA states that the ten-year limitations period is subject to equitable tolling. *Hilao v. Estate of Marcos*, 103 F.3d 767, 773 (9th Cir. 1996) (*Marcos III*) (citing S. Rep. No. 249, 102d Cong., 1st Sess., at 11 (1991)). Such tolling may be triggered if the defendant has engaged in wrongful conduct, or extraordinary circumstances occurred outside of the plaintiff's control, which prevented

the plaintiff from asserting his claim during the limitations period. *Id.* At bottom, however, "[o]ne who fails to act diligently cannot invoke equitable principles to excuse that lack of diligence." *Baldwin County Welcome Center v. Brown*, 466 U.S. 147, 151 (1984); *see also Lehman v. United States*, 154 F.3d 1010, 1016 (9th Cir. 1998), cert. denied, 526 U.S. 1040 (1999) ("Equitable tolling * * * is not available to avoid the consequences of one's own negligence.").

None of the allegations in the Korean and Chinese plaintiffs' complaints suggest that they could not have attempted to bring these claims sooner. To be sure, the Ninth Circuit only formally recognized a right of action under the ATCA in 1994. *See Marcos II*, 25 F.3d at 1475. But the statute has been in force since the 18th century and several courts found it to provide a cause of action much earlier than the Ninth Circuit. *See, e.g., Abdul-Rahman Omar Adra v. Clift*, 195 F. Supp. 857, 865 (D. Md. 1961) ("The wrongful acts were therefore committed in violation of the law of nations. And since they caused direct and special injury to the plaintiff, he may bring an action in tort therefor."); *Filartiga v. Pena-Irala*, 630 F.2d 876, 881 (2d Cir. 1980); *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 781 (D.C. Cir. 1984); *Forti v. Suarez-Mason*, 672 F. Supp. 1531, 1539 (N.D. Cal. 1987).

The Korean and Chinese plaintiffs do not assert reasons why their claims could not have been brought under the ATCA within ten years of the war's end. Their reference to the Japanese government's alleged suppression of similar claims brought by Korean forced laborers in Japan shortly after the war does not explain why the same claims could not have been alleged in a United States court. *See* Pl. Opp.

Br. (Doc. # 254) at 26 n.44. Moreover, to the extent the Korean and Chinese plaintiffs contend that they were not aware of the opportunity to bring these claims in the United States, "mere ignorance of the cause of action does not, in itself, toll the statute." *Volk, LA v. DA Davidson & Co.*, 816 F.2d 1406, 1416 (9th Cir. 1987).

The court concludes, therefore, that the ten year limitations period on the Korean and Chinese plaintiffs' international law claims under the ATCA has not tolled. Accordingly, to the extent such claims could have been asserted against defendants for their forced labor practices during the Second World War, they are barred by the statute of limitations.

B

As previously noted, the Korean and Chinese plaintiffs also seek compensation and restitution under other California state laws. Specifically, among the seven complaints the Korean and Chinese plaintiffs allege the following state law claims: (1) false imprisonment; (2) assault and battery; (3) conversion; (4) unjust enrichment and quantum meruit; (5) constructive trust; (6) accounting; (7) the Unfair Competition Act (UCA), Cal. Bus. & Prof. Code §§ 17200 et seq.; and (8) violations of Article 1 of the California Constitution and Penal Code § 181, which prohibit involuntary servitude. To the extent the conduct of defendants during the Second World War would have been actionable under any of these California laws, they are also barred by the applicable statutes of limitations.

Appendix B

It has long been established that a federal court addressing state law claims generally "utilizes its own state's statute of limitations." *Forsyth v. Cessna Aircraft Co.*, 520 F.2d 608, 613 (9th Cir. 1975); *see also* Restatement Second, Conflict of Laws § 142. Because the forced labor underlying these claims occurred in China and Japan, a conflict of law question arises for which the court must look to the laws of the forum state, including its choice of law rules, to determine which statutes of limitations to apply. *See Guaranty Trust Co. of N.Y. v. York*, 326 U.S. 99, 109-10 (1945); *Santana v. Holiday Inns, Inc.*, 686 F.2d 736, 737-38 (9th Cir. 1982). California employs a "governmental interest" approach to choice of law questions, essentially requiring an analysis regarding the potential conflict between the statute of limitations in California and those applicable in China and Japan and, if a conflict exists, an assessment of the competing interests of the forums. *See In re Yagman*, 796 F.2d 1165, 1170 (9th Cir. 1982). Such analysis is not necessary here, however, because the statutes of limitations from all three forums are significantly shorter than the age of these claims.

- Under California law, the longest applicable statute of limitations, which relates to the UCA, is just four years. *See* Cal. Bus. & Prof. Code § 17208. All of the other state law claims asserted by the Korean and Chinese plaintiffs trigger a limitations period under California law between one to three years from the date the claims accrued. *See* Cal. CCP §§ 338, 339, 340. The Civil Code of Japan provides that claims lapse if not exercised within ten years. *See* The Civil Code of Japan, art. 167 at FA 29 (Exhibits in Support of Motion to Dismiss (Doc. # 212), Exh. Z). Under the law of

China, the longest applicable statute of limitations is two years for civil suits. *See* Civil Law of China, arts. 135-37 (Exhibits in Support of Motion to Dismiss (Doc. # 212), Exh. AA).

The Korean and Chinese plaintiffs do not contend that these statutes of limitations have been tolled. In fact, they appear to concede the futility of these state law claims by arguing exclusively that their claims are valid under section 354.6 and the ATCA. In support of this assessment, the court notes that the people of the state of California, through the office of the Attorney General, states that "[a]bsent [section 354.6, the plaintiffs] would be without a remedy * * *." Amicus Curiae Brief of the People of the State of California (Doc. # 101) at 1. Further buttressing this conclusion is the fact that district courts in Japan addressing similar claims have uniformly dismissed such actions, in part, because the applicable statutes of limitations have run. *See* Appeal to International Labour Organization Regarding Violation of Convention No. 29 by Japan During Wartime (Pl. Appendix (Doc. # 14), Exh. I) at 3.

To the extent the Korean and Chinese plaintiffs' complaints are based on these California statutes, therefore, the court concludes that they are time-barred.

IV

For the foregoing reasons, the motions to dismiss and/or for judgment on the pleadings are GRANTED with respect to the actions involving the Korean and Chinese plaintiffs. The clerk shall enter judgment in the above-captioned cases,

terminate all motions and close the files.

IT IS SO ORDERED.

s/ Vaughn R. Walker
VAUGHN R. WALKER
United States District Judge